Ambank (M) Bhd v Malaysian Coal & Minerals Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO 28NCC-417–05 OF 2015
WONG KIAN KHEONG JC
15 MARCH 2016

Companies and Corporations — Winding up — Petition — Statutory demand served to debtor to pay sum but debtor failed to pay — Company commenced winding up proceedings — Whether debtor could apply to stay petition — Applicable test under s 73 of the Courts of Judicature Act 1964 and r 13 of the Rules of the Court of Appeal 1994 — Whether debtor could obtain stay of winding up order pending disposal of appeal to Court of Appeal against winding up order

The petitioner bank ('the petitioner') had obtained a judgment in default of appearance against the respondent in the High Court ('HC'). In the amended judgment, the respondent shall pay a sum of RM1,331,629.47. The petitioner served a statutory demand under s 218(2)(a) of the Companies Act 1965 ('the CA') for, among others, the respondent to pay a sum of RM1,174,449.21 ('the demanded sum') within 21 days. The respondent did not pay the demanded sum within the 21 days' period as stipulated in the statutory demand. Consequently, the petitioner filed this petition to, among others, wind up the respondent and to appoint the official receiver ('OR') as the liquidator of the respondent. The respondent applied to strike out this petition or as an alternative, this petition be stayed under the court's inherent jurisdiction until the respondent completes the sale of the respondent's two real properties ('two sales'). The issues that arose out of this petition was whether a party who is neither a creditor nor a contributory of a respondent company, could apply for leave of the winding up court to intervene in the winding up proceedings against the respondent company ('the first question'). If the first question is answered in the affirmative, could the purchaser of one of the real properties of the respondent company apply for leave to intervene in this petition; and a stay of this petition pending the completion of the sale in question. The other issues that arose were whether the respondent could apply to stay the petition pending the completion of the sale of the respondent's two pieces of real property; and what is the test to be applied under s 73 of the Courts of Judicature Act 1964 ('the CJA') and r 13 of the Rules of the Court of Appeal 1994 ('the RCA') on whether the respondent can obtain a stay of the winding up order pending the disposal of the respondent's appeal to the Court of Appeal against the winding up order.

Held:

(1) A literal reading of r 28(1), (2) and (3) of the Companies (Winding-Up) Rules 1972 ('the WUR') and Form 8 does not prohibit a person who is neither a creditor nor a contributory of a respondent company, from applying for leave of the winding up court to intervene as a co-respondent in the winding up petition. Nor is there any other rule in WUR which contains such a prohibition. There is a lacuna in the WUR on whether a person who is not a creditor and a contributory of a respondent company, could apply for leave of the winding up court to intervene as a co-respondent in the winding up petition. If the WUR are silent on this, O 15 r 6(2)(b) and (3) of the Rules of Court 2012 ('the ROC') may apply. Order 1 r 2(1)(c) of the ROC provides that subject to O 1 r 2(2) ROC, the ROC apply to 'all proceedings' in the HC. According to O 1 r 2(2) ROC, ROC do not apply if there are specific rules on the issue in question. Therefore, O 1 r 2(1)(c) of the ROC allows O 15 r 6 to apply (see paras 13 & 16).

(2) There could not be any room to apply the winding up court's inherent jurisdiction. Nor can there be any resort to O 92 r 4 of the ROC. The petitioner had not satisfied this court that the proposed intervener's presence in this petition was 'necessary to ensure that all matters in dispute' in this petition 'may be effectually and completely determined and adjudicated upon' in this petition. This was because the petition was based on the amended judgment and the statutory demand. This petition can be effectively and completely decided without the affidavit and submission of the proposed intervener. The petitioner was not seeking any remedy against the proposed intervener. Nor was the proposed intervener applying for any relief against the petitioner. There was therefore no question or issue arising out of or relating to or connected with any relief or remedy claimed' in this petition (see paras 18 & 24).

(3) The court could not exercise its discretion to stay this petition. In accordance with the expeditious disposal approach, this petition should not be stayed. This petition should be heard expeditiously in the interest of the following parties in the order of importance, namely, the creditors of the respondent, including the petitioner; third parties to whom the respondent had disposed of the respondent's assets, such as the proposed intervener; and the respondent's employees; and the respondent's contributories. All the above parties should be able to know for certain as soon as possible where they stand vis a vis the respondent after this petition has been expeditiously disposed of (see para 32).

(4) The issue raised by the proposed intervener regarding the winding up court's power to allow intervention of a person who was neither a creditor nor a contributory of the respondent company was a novel one; and the petitioner had contended that there was no power for the winding up

court to allow the intervention. The proposed intervener managed to persuade the winding up court that it has the discretionary power to allow intervention in winding up proceedings under O 15 r 6(2)(b) of the ROC (see para 35).

(5) The respondent was commercially insolvent when it failed to pay the demanded sum within the 21 days period as stipulated in the statutory demand. Such a failure on the respondent's part raised a rebuttable presumption of the respondent's commercial insolvency under s 218(2)(a) of the CA. Once a rebuttable presumption of the respondent's commercial insolvency arises under s 218(2)(a) of the CA, the respondent has the legal burden to rebut such a presumption on a balance of probabilities. There was nothing in the respondent's affidavits which could rebut the respondent's commercial insolvency under s 218(2)(a) of the CA on a balance of probabilities (see para 42).

[Bahasa Malaysia summary

Pempetisyen bank ('pempetisyen') telah memperoleh penghakiman ingkar akibat ketidakhadiran terhadap responden di Mahkamah Tinggi ('MT'). Dalam penghakiman terpinda, responden dikehendaki membayar jumlah RM1,331,629.47. Pempetisyen menyerahkan tuntutan statutori di bawah s 218(2)(a) Akta Syarikat 1965 ('AS') agar, antara lain, responden membayar RM1,174,449.21 ('jumlah yang dituntut') dalam masa 21 hari. Responden tidak membayar jumlah yang dituntut dalam tempoh 21 hari seperti yang ditetapkan dalam tuntutan statutori. Berikutan itu, pempetisyen memfailkan petisyen ini untuk, antara lain, menggulung responden dan melantik penerima rasmi ('PR') sebagai pelikuidasi responden. Responden memohon untuk membatalkan petisyen atau sebagai alternatif, agar petisyen digantung menurut budi bicara inheren mahkamah hingga responden menyempurnakan jualan dua hartanah responden ('dua jualan'). Isu-isu yang berbangkit daripada petisyen ini adalah sama ada pihak yang bukan penghutang mahupun penyumbang syarikat responden boleh memohon kebenaran mahkamah penggulungan untuk campur tangan dalam prosiding penggulungan terhadap syarikat responden ('soalan pertama'). Jika soalan pertama dijawab secara afirmatif, bolehkah pembeli salah satu hartanah responden syarikat memohon kebenaran untuk mencelah dalam petisyen ini dan memohon penggantungan petisyen sementara menanti penyempurnaan jualan dua hartanah responden; dan apakah ujian yang terpakai di bawah s 73 Akta Mahkamah Kehakiman 1964 ('AMK') dan A 13 Kaedah-kaedah Mahkamah Rayuan 1994 tentang sama ada responden boleh memperoleh penggantungan perintah penggulungan sementara menanti pelupusan rayuan responden ke Mahkamah Rayuan terhadap perintah penggulungan.

Diputuskan:

(1) Berdasarkan bacaan harfiah, A 28(1), (2) dan (3) Kaedah-kaedah

(Penggulungan) Syarikat 1972 ('WUR') dan Borang 8 tidak menghalang seseorang yang bukan penghutang mahupun penyumbang responden syarikat daripada memohon kebenaran mahkamah penggulungan untuk mencelah sebagai responden bersama dalam petisyen penggulungan. Tiada juga apa-apa aturan dalam WUR yang mengandungi larangan sedemikian. Terdapat kelompongan dalam WUR tentang sama ada seseorang yang bukan penghutang atau penyumbang responden syarikat boleh memohon kebenaran mahkamah penggulungan untuk mencelah sebagai responden bersama dalam petisyen penggulungan. Sekiranya WUR tidak menyatakan apa-apa tentang ini, A 15 k 6(2)(b) dan (3) Kaedah-kaedah Mahkamah 2012 ('KKM') terpakai. Aturan 1 k 2(1)(c) KKM memperuntukkan bahawa tertakluk pada A 1 k 2(2) KKM, KKM terpakai pada semua prosiding dalam MT. Menurut A 1 r 2(2) KKM, KKM tidak terpakai jika ada peraturan khusus tentang isu yang dipersoalkan. Oleh itu, A 1 k 2(1)(c) KKM membenarkan pemakaian A 15 k 6 (lihat perenggan 13 & 16).

(2) Tidak boleh ada apa-apa ruang untuk mengguna pakai budi bicara inheren mahkamah penggulungan. Aturan 92 k 4 KKM juga tidak boleh dijadikan sandaran. Pempetisyen tidak memuaskan mahkamah ini bahawa pencelah yang dicadangkan dalam petisyen ini perlu untuk memastikan bahawa perkara-perkara yang dipertikaikan dalam petisyen ini boleh diputuskan secara efektif dan sepenuhnya dalam petisyen ini. Ini kerana petisyen berasaskan penghakiman terpinda dan tuntutan statutori. Petisyen boleh diputuskan secara efektif dan sepenuhnya tanpa afidavit dan pengujahan pencelah terpinda. Pempetisyen tidak memohon apa-apa remedi terhadap pencelah yang dicadangkan. Pencelah yang dicadangkan juga tidak memohon apa-apa relif terhadap pempetisyen. Oleh itu, tiada soalan atau isu yang timbul berkenaan atau berkaitan apa-apa relif atau remedi yang dituntut dalam petisyen ini (lihat perenggan 18 & 24).

(3) Mahkamah tidak boleh menjalankan budi bicaranya untuk menggantung petisyen ini. Selaras dengan pendekatan pelupusan segera, petisyen ini tidak seharusnya digantung. Petisyen sewajarnya didengar berdasarkan kepentingan pihak-pihak berikut berdasarkan kepentingan mereka, khususnya, penghutang responden, termasuk pempetisyen, pihak ketiga yang kepadanya responden melupuskan aset-aset responden, seperti pencelah yang dicadangkan dan pekerja-pekerja serta penyumbang-penyumbang responden. Kesemua pihak ini sewajarnya tahu dengan yakin dan secepat mungkin bahawa mereka berdiri sama dengan responden selepas petisyen ini dilupuskan dengan segera (lihat perenggan 32).

(4) Isu yang dibangkitkan oleh pencelah yang dicadangkan tentang kuasa mahkamah penggulungan untuk membenarkan pencelahan orang yang

bukan penghutang atau penyumbang dalam responden syarikat adalah baharu; dan pempetisyen menghujahkan bahawa mahkamah penggulungan tiada kuasa membenarkan pencelahan sedemikian. Pencelah dicadangkan berjaya memujuk mahkamah penggulungan bahawa mahkamah penggulungan mempunyai kuasa budi bicara membenarkan pencelahan dalam prosiding penggulungan di bawah A 15 k 6(2)(b) KKM (lihat perenggan 35).

(5) Responden tidak solven secara komersil apabila gagal membayar jumlah yang dituntut dalam tempoh 21 hari seperti yang dinyatakan dalam tuntutan statutori. Kegagalan ini membangkitkan anggapan yang boleh disangkal tentang kesolvenan komersil responden berbangkit daripada s 218(2)(a) AS. Responden memikul beban di bawah undang-undang untuk menyangkal anggapan sedemikian atas imbangan kebarangkalian. Tiada apa-apa dalam afidavit responden yang boleh menyangkal kesolvenan komersil responden di bawah s 218(2)(a) AS atas imbangan kebarangkalian (lihat perenggan 42).]

Notes

For cases on petition, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1709–1878.

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A debtor (No 544/SD/98), Re [2000] 1 BCLC 103, Ch D (refd)
Aetna Properties Ltd v GA Listing and Maintenance Pty Ltd (1994) 13 ACSR 422, SC (refd)
AmBank (M) Bhd v Mujur Zaman Sdn Bhd & Ors [2008] 3 MLJ 608; [2008] 8 CLJ 754, HC (refd)
Amin Holdings Sdn Bhd lwn Weng Hock Ann Auto Parts Sdn Bhd dan satu lagi [1994] MLJU 214, HC (refd)
Arafura Finance Corporation Pty Ltd v Kooba Pty Ltd (No 2) (1987) 12 ACLR 331, SC (refd)
Australian Securities and Investments Commission v ABC Fund Managers Ltd (No 2) [2001] VSC 383, SC (refd)
Boston Timber Fabrications Ltd, Re [1984] BCLC 328, CA (refd)
BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd & another action [1996] 1 MLJ 872, HC (refd)
Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533 (refd)
BLV Realty II Ltd, Re [2010] EWHC 1791, Ch D (refd)
Brinds Ltd & Ors v Offshore Oil NL & Ors (No 2) (1985) 10 ACLR 242, SC (refd)
Calahurst Ltd, Re [1989] BCLC 140, Ch D (refd)
Chimbusco International Petroleum (Singapore) Pte Ltd v Jalalludin bin Abdullah and other matters [2013] 2 SLR 801, HC (refd)
Co-operative Central Bank Ltd & Anor v Railway Co-operative Multi-Purpose Society Ltd [1999] 2 MLJ 673, CA (refd)

Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors and another appeal [2008] 3 MLJ 530, CA (refd)

Dato' Suhaimi bin Ibrahim & Ors v Konsortium Lapangan Terjaya Sdn Bhd and other appeals [2014] 4 MLJ 419, CA (refd)

Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155, FC (refd)

Dayatera Roof Systems Sdn Bhd (in liquidation) v Seni Teliti Sdn Bhd [2015] 3 CLJ 940; [2015] 3 MLRH 1, HC (refd)

Equiticorp Holdings Ltd v United Securities Sdn Bhd [2007] 6 CLJ 268, CA (refd)

Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1) [1998] 1 MLJ 99, CA (refd)

Ga-Seng Paper Marketing Sdn Bhd v Percetakan Warni Sdn Bhd [2015] 4 AMR 221; [2015] 9 CLJ 640; [2015] 6 MLRH 297, HC (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121, FC (refd)

Indah Water Konsortium Sdn Bhd v Yong Kon Fatt [2007] 5 MLJ 250; [2007] 4 CLJ 613, CA (refd)

Infovalley Life Sciences Sdn Bhd v Srimelan Sdn Bhd [2015] 1 AMCR 707; [2015] 10 CLJ 315; [2015] 3 MLRH 1, HC (refd)

KTL Sdn Bhd v Azrahi Hotels Sdn Bhd (formerly known as Virtual Amber Sdn Bhd); Advance Hotels Supplies (M) Sdn Bhd & Anor, supporting creditors [2003] 5 MLJ 503; [2003] 3 CLJ 49, HC (not folld)

Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd [1990] 2 MLJ 511, HC (distd)

Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd [1990] 3 MLJ 309, HC (refd)

Kok Fook Sang v Juta Villa (M) Sdn Bhd & Ors [1996] 2 MLJ 666, CA (folld)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (refd)

Kredin Sdn Bhd v Development & Commercial Bank Bhd [1995] 3 MLJ 304, CA (refd)

Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)

Liew Jui Hua & Ors v Johor Property (M) Sdn Bhd [1996] MLJU 454; [1998] 2 CLJ Supp 34, HC (refd)

Lo Siong Fong, Re [1994] 2 MLJ 72, HC (refd)

Lyn Country Sdn Bhd v EIC Clothing Sdn Bhd & Anor [1997] 4 MLJ 198, HC (refd)

Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307, FC (refd)

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187; [2001] 3 CLJ 248, CA (folld)

Maziah binti Musa v Dato' Zainulabidin bin Mat Akhir & Ors [2014] 5 AMR 793, HC (refd)
Ng Bak Soon & Ors v Ji Seng Hong Plastic Manufacturing Sdn Bhd; Mustapha Mohamed (receiver & manager and applicant) [2015] 2 CLJ 828, HC (refd)
Ng Tai Tuan & Anor v Chng Gim Huat Pte Ltd [1991] 3 MLJ 388, HC (refd)
Ngan Tuck Seng & Anor v Ngan Yin Hoi Groundnut Factory Sdn Bhd [1999] 5 MLJ 509, HC (refd)
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2011] 1 CLJ 947, CA (refd)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (refd)
Pek Chuan Development Pte Ltd, Re [1988] 3 MLJ 140, HC (refd)
Pentasia (Pte) Ltd, Re [1979] 2 MLJ 59 (refd)
Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178, SC (refd)
Perwira Affin Bank Bhd v KI Production Sdn Bhd [2000] 4 MLJ 652; [2000] 4 CLJ 482, HC (refd)
Pilecon Realty Sdn Bhd v Public Bank Bhd & Ors and another appeal [2013] 3 MLJ 1; [2013] 2 CLJ 893, FC (refd)
Metropolitan Railway Warehousing Co Ltd, Re (1867) 31 LJ Ch 827, Ch D (refd)
Re A & BC Chewing Gum Ltd; Topps Chewing Gum Inc v Coakley and others [1975] 1 All ER 1017, Ch D (refd)
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598; [1997] 2 CLJ 299, CA (refd)
Si & Si Sdn Bhd v Hazrabina Sdn Bhd [1996] 2 MLJ 509; [1996] 3 CLJ 657, SC (refd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313; [1992] 1 CLJ Rep 303, SC (refd)
Sykt Telekom Malaysia v Business Chinese Directory Sdn Bhd [1996] 3 MLJ 692; [1997] 1 CLJ 596, CA (refd)
Tajjul Ariffin bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143, SC (refd)
Tan Sooi Shin v Kow Kek Hing [1991] 3 MLJ 390, HC (refd)
Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479; [2000] 1 CLJ 553, CA (refd)
Ting Yuk Kiong v Mawar Biru Sdn Bhd (Harry Lee Yew Tong, applicant) [1995] 2 MLJ 700; [1995] 3 CLJ 136, HC (refd)
Tsoi Ping Kwan v Medan Juta Sdn Bhd & Anor [1996] 3 MLJ 367, CA (refd)
Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830, CA (refd)
Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709, FC (refd)
Yu Chee Lieng and others v Khing Tung Realty Sdn Bhd (Part 2) [2008] MLJU 148; [2008] 10 CLJ 697, HC (refd)

Legislation referred to

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Civil Law Act 1956 s 4(1), (2)
Companies (Winding-up) Rules 1972 rr 3(1), 28, 28(1), (2), (3), First Schedule, Form 8
Companies Act [SG]
Companies Act 1965 ss 176(10), 218(1)(e), (2)(a), 219(2), 221, 221(1), 223, 227(1), 231, 236(1)(a), (1)(i), 243, 243(1), 253(2), 291(1), (2), 293(1), (2)(a)(i)
Courts of Judicature Act 1964 s 73
Evidence Act 1950 s 114(e)
Interpretation Acts 1948 and 1967 ss 2(1)(b), (1)(e), 40(1), Part 1
National Land Code s 266
Revision of Laws Act 1968
Rules of Court 2012 O 1 rr 2, 2(1)(c), (2), O 2 r 2(2), O 3 r 15(15), O 15 rr 6, 6(2), (2)(b), (2)(b)(i), (2)(b)(ii), (3), (4), O 92 r 4
Rules of the Court of Appeal 1994 r 13
Rules of the High Court 1980 O 92 r 4

Kingston TK Tan (Kwong Ho Qong with him) (Heiley Hassan, Tan & Partners) for the petitioner.
Devinder Singh (Devinder & Co) for the respondent.
Md Isherafer bin Ali (Isherafer Ali & Assoc) for the proposed intervener.

Wong Kian Kheong JC:

INTRODUCTION

[1] This winding up petition ('this petition') raises, among others, the following questions:

(a) whether a party who is neither a creditor nor a contributory of a respondent company, can apply for leave of the winding up court to intervene in the winding up proceedings against the respondent company ('first question');

(b) if the first question is answered in the affirmative, can the purchaser of one of the real properties of the respondent company ('the respondent') apply for:

(i) leave to intervene in this petition; and

(ii) a stay of this petition pending the completion of the sale in question;

(c) whether the respondent can apply to stay the petition pending the completion of the sale of the respondent's two pieces of real property; and

(d) what is the test to be applied under s 73 of the Courts of Judicature Act 1964 ('the CJA') and r 13 of the Rules of the Court of Appeal 1994 ('the RCA') on whether the respondent can obtain a stay of the winding up order pending the disposal of the respondent's appeal to the Court of Appeal against the winding up order.

FACTS

[2] The petitioner bank ('the petitioner') had obtained a judgment in default of appearance against the respondent in the Kuala Lumpur High Court ('HC') on 20 October 2014 ('judgment'). The petitioner then obtained an order from the HC to amend the judgment on 29 January 2015 ('amended judgment'). According to the amended judgment, the respondent shall pay:

(a) a sum of RM1,331,629.47 as at 4 February 2014;

(b) interest, including penalty interest, at stipulated rates for specified periods of time; and

(c) costs.

[3] On 29 April 2015, the petitioner's solicitors served by hand a demand ('statutory demand') under s 218(2)(a) of the Companies Act 1965 ('the CA') for, among others, the respondent to pay a sum of RM1,174,449.21 ('demanded sum') as at 29 April 2015 within 21 days from the receipt of the statutory demand. The demanded sum consisted of the following:

(a) an amount of RM1,331,629.47 due under the amended judgment as at 4 February 2014;

(b) interest amounting to RM141,319.74 as calculated according to amended judgment;

(c) costs; and

(d) less three payments made by the respondent to the petitioner on 20 May 2014, 19 June 2014 and 27 January 2015 totalling RM300,000.

[4] The respondent did not pay the demanded sum within the 21 days' period as stipulated in the statutory demand. Consequently, the petitioner filed this petition to, among others, wind up the respondent and to appoint the official receiver ('OR') as the liquidator of the respondent.

TWO INTERLOCUTORY APPLICATIONS

[5] In court encl No 14 ('court encl No 14'), the respondent filed a summons in chambers for the following orders, among others:

(a) this petition be struck out ('first prayer in court encl No 14'). The respondent's learned counsel withdrew the first prayer in court encl No 14 in his written submission;

(b) as an alternative to the first prayer in court encl No 14, all proceedings in this petition be stayed under the court's inherent jurisdiction until the respondent completes the sale of the respondent's two real properties ('two sales') as follows:

(i) a two-storey shop office held under Master Title No PN 30378, Lot 28055, Mukim Setapak, Kuala Lumpur ('KL shop office') which has been charged to the petitioner under the National Land Code ('the NLC'); and

(ii) a piece of industrial land held under Title No PN 16690, Lot 28664, Mukim Sungai Karang, Kuantan, Pahang ('Kuantan land') which has been charged to AmIslamic Bank Bhd ('AIBB') under the NLC

('second prayer in court encl No 14');

(c) if and when necessary, the petitioner to consent to the two sales ('third prayer in court encl No 14'); and

(d) costs of court encl No 14 to be borne by the petitioner.

[6] On 4 November 2015, Unison Marine (M) Sdn Bhd ('proposed intervener') filed an application in court encl No 32 ('court encl No 32') for, among others, the following orders:

(a) all proceedings in this petition be stayed until the disposal of court encl No 32 ('first prayer in court encl No 32');

(b) the proposed intervener be given leave to intervene in this petition ('second first prayer in court encl No 32');

(c) all proceedings in this petition be stayed until:

(i) the completion of the sale of the Kuantan land to the proposed intervener by way of a sale and purchase agreement dated 24 August 2015 between the respondent and the proposed intervener ('SPA (Kuantan land)'); and

(ii) the sum due to the petitioner under the amended judgment has been satisfied

('third prayer in court encl No 32'); and

(d) no order as to costs for court encl No 32.

[7] On 17 November 2015, I directed as follows:

(a) court encl No 32 would be heard first because if the second first prayer in court encl No 32 (intervention application) was allowed, the proposed intervener had the right to file affidavit and to present submission in respect of court encl No 14 and this petition;

(b) after the disposal of court encl No 32, court encl No 14 would be decided; and

(c) this petition could only be heard after the disposal of court encl Nos 32 and 14.

In view of the above direction, the first first prayer in court encl No 32 had become redundant.

COURT ENCL NO 32

Can a party who is not a creditor and contributory of respondent company intervene in winding up proceedings?

[8] Encik Md Isherafer bin Ali, learned counsel for the proposed intervener, has submitted as follows in support of second first prayer in court encl No 32:

(a) there is no specific provision in the Companies (Winding-up) Rules 1972 ('the WUR') which prohibits a person who is not a creditor and contributory of a respondent company but is 'interested' in a winding up petition, from intervening in the petition. As such, O 15 r 6(2) of the Rules of Court 2012 ('the RC') applies in such a case according to O 1 r 2(2) of the RC. Reliance had been placed by the proposed intervener on the following cases:

(i) the Court of Appeal case of *Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1)* [1998] 1 MLJ 99 ('Fairview Schools Bhd (No 1)');

(ii) a case digest of Low Hop Bing JC's (as he then was) judgment in *Amin Holdings Sdn Bhd v Weng Hock Ann Auto Parts Sdn Bhd & Anor* [1994] MLJU 214, Companies Winding Up No 28–31 of 1992, *Mallal's Digest*, 4th Ed (2013 Reissue), Vol 3(1), at para 1513;

(iii) the HC case of *Ng Bak Soon & Ors v Ji Seng Hong Plastic Manufacturing Sdn Bhd; Mustapha Mohamed (receiver & manager and applicant)* [2015] 2 CLJ 828;

(iv) the Privy Council's judgment in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 ('Pegang Mining'), an appeal from Malaysia; and

(v) the Court of Appeal's decision in *Co-operative Central Bank Ltd & Anor v Railway Co-operative Multi-Purpose Society Ltd* [1999] 2 MLJ 673 ('CCBL'); and

(b) if this court does not allow the intervention of the proposed intervener, the proposed intervener's rights will be 'directly affected' as follows:

(i) the proposed intervener had entered into the SPA (Kuantan land) to purchase the KL shop office for RM2.7m ('price (Kuantan land)');

(ii) the proposed intervener had paid a deposit of RM270,000 ('deposit') to the respondent pursuant to the SPA (Kuantan land);

(iii) the proposed intervener had obtained a loan or RM1,890,000 from RHB Bank Bhd to finance the proposed intervener's purchase of the Kuantan land ('RHB Bank loan');

(iv) the SPA (Kuantan land) required consent of the state authority ('state authority's consent') for the sale of the Kuantan land to the proposed intervener. The application for the state authority's consent has already been made and is still pending;

(v) the proposed intervener was not aware and had not been informed by the respondent regarding this petition until the proposed intervener received a copy of the respondent's letter dated 2 October 2015 to the petitioner ('respondent's letter dated 2 October 2015') and after the proposed intervener had enquired from the respondent regarding the respondent's letter dated 2 October 2015. I will discuss the significance of the respondent's letter dated 2 October 2015 later in this judgment;

(vi) AIBB, as the chargee of the Kuantan land, had obtained a High Court order for the sale of the Kuantan land under the NLC ('sale order (Kuantan land)'). The sum due from the respondent to AIBB is RM724,495.43 ('respondent's indebtedness due to AIBB'). There is a surplus of RM1,705,504.60 after deducting the respondent's indebtedness due to AIBB from the price (Kuantan land). Such a surplus is more than sufficient to settle the demanded sum (due to the petitioner); and

(vii) although AIBB has obtained the sale order (Kuantan land), the respondent is entitled under s 266 of the NLC to tender payment of the respondent's indebtedness due to AIBB before the Kuantan land is sold by way of public auction.

[9] The petitioner's learned counsel, Mr Kingston Tan, had opposed second first prayer in court encl No 32 on the following grounds:

(a) the second first prayer in court encl No 32 is 'unknown' in the CA and WUR;

(b) the proposed intervener is neither a creditor nor a contributory of the respondent; and

(c) court encl No 32 had been filed at the 'last minute' and was therefore not bona fide and an abuse of court process as a tactical maneuver to delay the hearing of this petition.

[10] Rule 28 of the WUR provides as follows:

28 Notice of intention to appear

(1) *Every person who intends to appear on the hearing of a petition shall serve on the petitioner or his solicitor notice of his intention. The notice shall be signed by the person or by his solicitor and shall give the address of the person signing it and shall be served or if sent by post shall be posted in such time as in ordinary course of post to reach the address not later than 12.00 o'clock noon of the day previous to the day appointed for the hearing of the petition.*

(2) The notice may be in Form 8 with such variations as circumstances may require.

(3) A person who has failed to comply with this rule shall not, without special leave of the Court, be allowed to appear on the hearing of the petition. (Emphasis added).

[11] Form 8 in the First Schedule to the WUR ('Form 8') is reproduced below:

No. 8

(Rule 28)

NOTICE OF INTENTION TO APPEAR ON PETITION

(Title)

TAKE notice that A. B. , of (a) creditor for $..... of (or contributory holding (b) ..... shares in) the above company intends to appear on the hearing of the petition advertised to be heard on the ..... day of ..... 19 ....., and to support (or oppose) such petition.

(Signed) (c) [Name of person or firm]

(Address)

To

.....

NOTE —

(a) State full name, or if a firm, the name of the firm and address.

(b) State number and class of shares held.

(c) To be signed by the person or his solicitor.

(Emphasis added).

[12] According to r 3(1) of the WUR, the forms prescribed in the First Schedule to the WUR, where applicable, may be used for the purpose of the WUR. Reading together r 28(1), (2) and (3) of the WUR and Form 8, it is clear that the creditors and contributories of a respondent company may appear to support or oppose a winding up petition by filling up Form 8 and by serving the completed Form 8 on the petitioner or the petitioner's solicitor on or before 12pm of the day preceding the hearing date of the winding up petition. I rely on the Court of Appeal's judgment delivered by Mahadev Shankar JCA in *Kok Fook Sang v Juta Villa (M) Sdn Bhd & Ors* [1996] 2 MLJ 666, at p 676, as follows:

> *A collateral point which arose in this appeal was Mr Hira Singh's objection to the locus standi of Mr Chee who went on record as counsel for Public Bank. In a winding-up petition, a creditor has a right to appear at the hearing of the petition: See r 28 of the Companies (Winding-up) Rule 1972.* (Emphasis added).

[13] I am of the view that a literal reading of r 28(1), (2) and (3) of the WUR and Form 8 does not prohibit a person who is neither a creditor nor a contributory of a respondent company, from applying for leave of the winding up court to intervene as a co-respondent in the winding up petition. Nor is there any other rule in WUR which contains such a prohibition. Accordingly, I accept the proposed intervener's submission that there is a lacuna in the WUR on whether a person who is not a creditor and a contributory of a respondent company, can apply for leave of the winding up court to intervene as a co-respondent in the winding up petition.

[14] Order 1 r 2, O 15 r 6 and O 92 r 4 of the RC provide as follows:

> Order 1 rule 2 Application
>
> *(1) Subject to paragraph (2), these Rules apply to all proceedings in —*
>
> (a) the Magistrates' Court;
>
> (b) the Sessions Court; and
>
> (c) *the High Court*.
>
> *(2) These Rules do not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.*
>
> (3) Where prior to the coming into operation of these Rules, reference is made in any written law to any Rules of Court that reference shall be to these Rules.
>
> Order 15 rule 6 Misjoinder and non-joinder of parties
>
> (1) A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application —

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) *order any of the following persons to be added as a party, namely —*

(i) *any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*

(ii) *any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.*

(3) An application by any person for an order under paragraph (2) adding him as a party shall, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.

A person shall not be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

Order 92 rule 4 Inherent powers of the Court

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

(Emphasis added).

[15] All the cases cited by the proposed intervener ('proposed intervener's cases') do not concern the issue of whether a purchaser of land belonging to a respondent company which is facing winding up proceedings, can apply for leave of winding up court to intervene in the winding up proceedings. The proposed intervener's cases can be explained as follows:

(a) in *Fairview Schools Bhd (No 1)*:

(i) the two proposed interveners were contributories of the respondent school but did not appear in the winding up proceedings in the HC;

(ii) the HC wound up the respondent school and the respondent school appealed to the Court of Appeal against such a winding up order;

(iii) the two proposed interveners did not file any appeal against the winding up order of the respondent school but applied to intervene at the appellate stage before the Court of Appeal; and

(iv) the Court of Appeal dismissed the intervention application by the two proposed interveners because the two proposed interveners did not appear in the HC. I reproduce the judgment of Mahadev Shankar JCA in *Fairview Schools Bhd (No 1)*, at pp 104–107, as follows:

> *Encik Yusof Khan's first submission was that, as there was nothing in the Companies (Winding-up) Rules 1972 ('the Winding-up Rules') permitting intervention, the application was misconceived. He said the Rules of the High Court 1980 ('the RHC') were irrelevant. He relied on Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290 at p 295 *where the judgment reads (per Gunn Chit Tuan SCJ):*
>
> > On the other hand, an order for a company to be wound up on a petition under s 217 of the Companies Act 1965 may only be made by a court if one of the circumstances specified in the following s 218(1) of the Companies Act has been proved: ... (Section 218(1) of the Act was then set out and the judgment continues). In such a case, the Rules of the High Court 1980 do not apply.
> >
> > ...
>
> ... In the court below, the title to the petition proclaimed that it was filed under s 218 of the Companies Act 1965. Order 88 r 5 of the RHC does not refer to applications to wind up under s 218 of the Act. *Therefore, the initiation of such petitions, their form, etc must of necessity be governed by the special provisions contained in the Winding-up Rules. We are unable however to countenance En Yusof Khan's contention that interested parties are so strait-jacketed by the Winding-up Rules as to be without a remedy on matters where these rules are silent.*
>
> For ourselves, would give a liberal interpretation to s 253(2) of the Act which reads as follows:
>
> Powers of Court cumulative
>
> > Subject to the rules an appeal from any order or decision made or given in the winding up of a company shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the court in cases within its ordinary jurisdiction. (Emphasis added.)
>
> *By s 4 of the Act, the 'court' referred to means the High Court or a judge thereof and 'rules' mean the rules of the court. Consequently, we think that where the Winding-up Rules make specific provisions for a particular matter, it would exclude a parallel provision in the rules of the court but where the Winding-up Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provision exists. If not, it can always resort to O 92 r 4 of the RHC. The powers of the court on hearing a petition provided by s 221 of the Act are exercised in conformity with RHC and the appeal is a rehearing.*

...

So a contributory or creditor in a winding-up is a party and not an intervener in the sense of Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor [1995] 1 MLJ 668, who sought to inject themselves into the proceedings. *Wilful failure to participate in the proceedings and acquiescing in the order made will provide grounds for refusal of leave. Pargash Singh and Chee Soo Teng did not explain why they had not appeared in the court below*.

In the result, we unanimously agreed that the application by Pargash Singh and Chee Soo Teng to intervene be dismissed with costs. (Emphasis added).

Fairview Schools Bhd (No 1) has clearly decided that a respondent company's creditors and contributories may appear in the winding up proceedings as parties without the need to apply for leave of the winding up court to intervene in the winding up proceedings. Such a decision is clearly supported by r 28(1), (2) and (3) WUR read with Form 8. In *Fairview Schools Bhd (No 1)*, the two proposed interveners at the Court of Appeal stage, were contributories of the respondent school who did not appear in the winding up proceedings in the HC although they were entitled do so without the need to apply for leave of the winding up court to intervene. *Fairview Schools Bhd (No 1)* did not discuss the question of whether a party who is neither a creditor nor a contributory of the respondent company may apply to intervene in the winding up proceedings. *Fairview Schools Bhd (No 1)* is however significant in deciding that if there is a lacuna in the WUR, the court 'must apply its own procedure where express provision exists' and if not, the court '*can always resort*' to the then O 92 r 4 of the Rules of the High Court 1980 ('the RHC') (which is identical to the present O 92 r 4 of the RC);

(b) in respect of the case digest in *Amin Holdings Sdn Bhd*, I do not have the benefit of the written judgment in that case. As such, I am unable to extract the *ratio decidendi* of *Amin Holdings Sdn Bhd*. I refer to the Federal Court's judgment given by Suffian LP in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, at p 170, as follows:

The full judgment in Heah Chin Kim [1954] MLJ xxxiii is not available and it is impossible for us to determine its ratio decidendi. (Emphasis added.)

(c) in *Ng Bak Soon*:

(i) the HC had wound up the respondent company. Subsequently, the holder of debentures created by the respondent company, Hong Leong Bank Bhd, appointed a receiver and manager ('R&M') over the wound up respondent company;

(ii) the R&M entered into various sale and purchase agreements and assignment with third parties in respect of the respondent company's

land, machinery, fixtures, fittings and trade marks (R&M's dispositions). The R&M applied to the winding up court to intervene as a party and for an order from the winding up court to validate the R&M's dispositions under s 223 of the CA ('validation application'). Section 223 of the CA provides as follows:

> 223 Avoidance of disposition of property, etc
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

(iii) Che Mohd Ruzima Ghazali JC in the HC allowed the R&M's intervention application on the following grounds, at pp 833–834:

> Preliminary Point Of Law
>
> [14] The petitioners had submitted that it was too late for the applicant to intervene. The applicant's application for leave to intervene in the winding-up proceedings for validation orders for the sale of the respondent's assets and for assignment of its trademarks pursuant to s 223 of the Companies Act was filed after the winding-up proceedings have been concluded with the winding-up order being granted on 18 October 2012. Therefore there are no longer any winding-up proceedings before this court in existence for the applicant to intervene (the Federal Court case of *Hong Leong Bank Bhd v Staghorn Sdn Bhd and Other Appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121 was referred).
>
> [15] The applicant replied by saying that the said grounds of objection is flawed both in fact and in law. Despite the winding-up order was granted on 18 October 2012, the winding-up has however been stayed pursuant to the order of the Court of Appeal dated 3 April 2013 with the effect that the status quo of the respondent was preserved. This was expressly admitted by the petitioners. The petitioners' own admission clearly contradicted and defeated the petitioners' grounds for preliminary objection.
>
> ...
>
> [18] *As regard to the preliminary point of law raised by the petitioners, I am of the opinion that the application by the applicant to intervene does not intend to interfere with the winding up order. This application has nothing to do with the winding up order. The main purpose of the application is to apply for the validation order under s 223 of the Companies Act. Even though there are no longer any winding-up proceedings before this court, it is my view that the applicant can still use the existing files to apply for the validation order for the disposition of the respondent's assets sinceit was related to the winding-up order given by this court.*
>
> [19] *In the premise, in order to apply for the validation order, I find that it is proper for the applicant to apply for leave to intervene in the existing winding-up proceeding and therefore the objection on the preliminary point of law raised by*

the petitioners doesn't hold water and I dismiss it. (Emphasis added.)

It is clear that the various purchasers of the respondent company's land, machinery, fixtures, fittings and trade marks, did not apply to intervene in *Ng Bak Soon*. I am of the respectful view that an applicant in a validation application under s 223 CA need not apply to intervene in the winding up proceedings for the following reasons:

(A) an applicant in a validation application only seeks a validation order under s 223 of the CA and has no interest in the winding up affairs of the company in question. In *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309, at p 311, Zakaria Yatim J (as he then was) held as follows in the HC:

The question of validating a transaction is at the discretion of the court but a person who seeks an order to validate a transaction must make an application for such an order. In the present case there is no such application.

The HC in *Kimoyama Elektrik (M) Sdn Bhd* did not require an applicant in a validation application to apply to intervene in the winding up proceedings; and

(B) a validation application may be made by way of a fresh suit. In the HC case of *BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd & another action* [1996] 1 MLJ 872, at pp 877–878, the plaintiff bank filed an originating summons for, among others, an order to validate the plaintiff bank's proposed transfer of fixed deposit account funds in the name of the wound up company to the wound up company in view of a consent order to stay the winding up proceedings. Abdul Malik Ishak J (as he then was), at pp 883–884, gave the validation order;

(d) *Pegang Mining* and *CCBL* did not concern winding up proceedings, let alone the question of whether a purchaser of a wound up respondent company's assets may apply for leave of the winding up court to intervene in the winding up proceedings.

[16] As explained above, the WUR are silent on whether the proposed intervener may apply for leave of this court to intervene in this petition. I am of the opinion that in view of the above lacuna in WUR, O 15 r 6(2)(b) and (3) of the RC may apply. This is because O 1 r 2(1)(c) of the RC provides that subject to O 2 r 2(2) of the RC, the RC apply to 'all proceedings' in the HC. According to O 1 r 2(2) of the RC, the RC does not apply if there are specific

rules on the issue in question. In this case, the WUR are silent on the issue of whether the proposed intervener may apply for leave of this court to intervene in this petition. As such, O 1 r 2(1)(c) of the RC allows O 15 r 6 of the RC to apply to such an issue.

[17] I am mindful that in the following cases, the winding up court has applied the inherent jurisdiction and/or O 92 r 4 of the RHC:

(a) *Fairview Schools Bhd (No 1)* at p 106;

(b) VC George J's (as he then was) judgment in the HC case of *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533 at pp 534–535;

(c) Kamalanathan Ratnam JC's (as he then was) decision in the HC in *Lyn Country Sdn Bhd v EIC Clothing Sdn Bhd & Anor* [1997] 4 MLJ 198 at p 215; and

(d) the judgment of Clement Skinner JC (as he then was) in the HC case of *Ngan Tuck Seng & Anor v Ngan Yin Hoi Groundnut Factory Sdn Bhd* [1999] 5 MLJ 509 at pp 519–520.

[18] As elaborated above, in view of the lacuna of WUR, O 15 r 6(2)(b) and (3) of the RC apply to the issue of whether the proposed intervener may intervene in this petition. In view of the express provisions of O 15 r 6(2)(b) and (3) of the RC, I am of the respectful opinion that there cannot be any room to apply the winding up court's inherent jurisdiction. Nor can there be any resort to O 92 r 4 of the RC. The following two decisions of our apex court have held that there cannot be any reliance on the court's inherent jurisdiction when there is an express statutory provision:

(a) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 at p 181; and

(b) the judgment of Zulkefli FCJ (as His Lordship then was) in the Federal Court case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307 at p 320.

Whether court should exercise discretion to allow intervention of proposed intervener in this petition

[19] If I have erred in applying O 15 r 6(2)(b) and (3) of the RC in winding up proceedings, the second prayer in court No 32 should be dismissed on this ground alone. Consequently, there is no need to decide the third prayer in court encl No 32.

[20] In the event that O 15 r 6(2)(b) and (3) of the RC apply to winding up proceedings, I will now proceed to decide the second prayer in court No 32.

[21] I am of the following view regarding an intervention application under O 15 r 6(2)(b) and (3) of the RC ('intervention application'):

(a) an applicant to intervene in proceedings ('the applicant') must satisfy the court of the existence of either one or both sets of circumstances as follows:

(i) the applicant 'ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon' within the meaning of O 15 r 6(2)(b)(i) of the RC ('first set of circumstances'); and/or

(ii) as between the applicant and 'any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between [the applicant] and that party as well as between the parties to the cause or matter' ('second set of circumstances'). The second set of circumstances has been provided in O 15 r 6(2)(b)(ii) of the RC;

(b) the intervention application must be made before the court has made a final decision on the matter in which the applicant seeks to intervene. I refer to the Federal Court's judgment in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121 as follows:

(i) Abdul Hamid Mohamad CJ at pp 630, 634–638 and pp 645–647 (MLJ); pp 136, 142–144 and pp 153–154 (CLJ):

> *... an application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made under O 15 r 6 of the RHC 1980. The application may be made 'at any stage of the proceedings' meaning before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in. The judge has also become functus officio. Even then, the application must be made promptly*. Order 15 r 6 of the RHC 1980 applies to all civil proceedings ... (Emphasis added.)

(ii) Abdul Aziz FCJ, at p 659 (MLJ); p 169 (CLJ):

> *... the addition of a party can only be made in a cause or matter that has not been concluded and brought to an end. The wording of para (b) (O 15 r 6(2)) would not enable a person to come in and be added as a party to undo what has already been done or decided in a cause or matter.* (Emphasis added.)

(iii) Azmel FCJ, at p 190 (MLJ); p 163 (CLJ), agreed with Abdul Hamid Mohamad CJ;

(c) according to O 3 r 15(15) of the RC, except with leave of court, the intervention application 'shall' be supported by an affidavit from the applicant ('applicant's affidavit') which shows:

(i) the applicant's 'interest' in the matter in which the applicant seeks to intervene; and/or

(ii) 'the question or issue to be determined as between (the applicant) and any party to the cause or matter';

(d) even if the applicant manages to show in the applicant's affidavit the existence of the first and/or second set of circumstances, the court nevertheless has the discretionary power to allow or dismiss the intervention application. This court's discretion is clear from the use of the permissive term 'may' in O 15 r 6(2)(b) of the RC and the judgment of the Privy Council in *Pegang Mining* at p 56, as delivered by Lord Diplock;

(e) written judgments on whether intervention applications are allowed or dismissed, concern the exercise of the courts' discretion based on the particular evidence adduced in those courts. As such, the exercise of judicial discretion in an intervention application is not a binding precedent from the view point of the stare decisis doctrine. I cite the Supreme Court's judgment delivered by Edgar Joseph Jr SCJ in *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143 at p 152, as follows:

> *First of all, we would begin by saying that it is manifestly clear that in neither Hee Awa nor Chan Yee, was the Supreme Court attempting to lay down any principles whatsoever, other than those found in the relevant rules of the court, to govern the exercise of a judicial discretion reposed in the court of first instance. As was well put by Bowen LJ in Jones v Curling & Anor at p 271:*
>
> > *I have always entertained the strongest opinion that the court would be acting ultra vires if it were to lay down a hard and fast line upon which discretion should be exercised when the Act of Parliament or judicature rule which creates the discretion gives it in simple and unqualified terms.*
>
> *It follows, that if judges were to attempt to lay down any general rule for the exercise of a discretion created under the relevant rule of the court then, as was pointed out by Brett MR in The Friedberg at p 113, they would be trying to fetter their own discretion and that of their successors which they would have no legal power to do.* (Emphasis added.)

(f) the court may exercise its discretion on its own motion to join any person as a party to the proceedings in question. This is clear from the phrase '*of its own motion*' in O 15 r 6(2) of the RC and the Court of Appeal's judgment delivered

by Gopal Sri Ram JCA (as he then was) in *Tsoi Ping Kwan v Medan Juta Sdn Bhd & Anor* [1996] 3 MLJ 367 at pp 379–380. The only qualification is that under O 15 r 6(4) of the RC, the court can only join a person as a co-plaintiff with the party's written consent. If a person does not give written consent to be joined by the court of its own motion as a co-plaintiff, the court will then join the person as a co-defendant.

[22] Before I proceed to decide the second first prayer in court encl No 32, I refer to s 221 of the CA as follows:

> 221 Powers of Court on hearing petition
>
> (1) *On hearing a winding up petition the Court may dismiss it* with or without costs *or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit*, but the Court shall not refuse to make winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of a petition by a contributory that there will be no assets available for distribution amongst the contributories.
>
> (2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition —
>
> (a) direct that any notices be given or any steps taken before or after the hearing of the petition;
>
> (b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the Court;
>
> (c) direct that oral evidence be taken on the petition or any matter relating thereto;
>
> (d) direct a speedy hearing or trial of the petition or any issue or matter;
>
> (e) allow the petition to be amended or withdrawn; and
>
> (f) give such directions as to the proceedings as the Court thinks fit.
>
> (3) Where the petition is presented on the ground of default in lodging the statutory report or in holding the statutory meeting, the Court may instead of making a winding up order, direct that the statutory report shall be lodged or that a meeting shall be held and may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.
>
> (Emphasis added.)

[23] Under s 221(1) of the CA, the winding up court may make any one of the four following orders ('four possible orders'):

(a) the winding up court may stay the petition with or without condition;

(b) the winding up court may make any interim order;

(c) the winding up petition may be dismissed; and

(d) the winding up court may wind up the respondent company.

The four possible orders have been explained by VC George J (as he then was) in the HC case of *Tan Sooi Shin v Kow Kek Hing* [1991] 3 MLJ 390 at p 391, as follows:

> *The said portion of s 221(1) consists of three limbs, viz that on hearing the petition the court may (1) dismiss it with or without costs; or (2) adjourn the hearing conditionally or unconditionally; or (3) make any interim or other order.*
>
> *It is to be noted that the arrangement of the words used makes it clear that 'with or without costs' has reference to the power to dismiss the petition, 'conditionally or unconditionally' to the power to adjourn the hearing, and it follows that 'or other order' has reference to the power to the court to make any interim order. It is also to be noted that some further support for the view that 'or other order' relates to 'interim' orders has no general application, is obtained from the fact that the phrase used is 'make any interim or other order' and not 'make any interim order' and that there is a fourth limb to the subsection, viz 'or (4) make any other order'.* (Emphasis added.)

[24] I have decided to exercise my discretion under O 15 r 6(2)(b) of the RC not to grant leave for the proposed intervener to intervene in this petition. The reasons for the exercise of such a discretion are as follows:

(a) the petitioner had not satisfied this court that the proposed intervener's presence in this petition is 'necessary to ensure that all matters in dispute' in this petition 'may be effectually and completely determined and adjudicated upon' in this petition. This is because the petition is based on the amended judgment and the statutory demand. this petition can be effectively and completely decided without the affidavit and submission of the proposed intervener. Accordingly, the first set of circumstances under O 15 r 6(2)(b)(i) of the RC does not exist in this case;

(b) the petitioner is not seeking any remedy against the proposed intervener in this petition. Nor is the proposed intervener applying for any relief against the petitioner. There is therefore no 'question or issue arising out of or relating to or connected with any relief or remedy claimed' in this petition between the proposed intervener and:

(i) the petitioner; *and/or*

(ii) the respondent

which, in the opinion of the Court, would be just and

convenient to determine' as between the proposed intervener and:

(A) the petitioner; *and/or*

(B) the respondent.

In other words, the second set of circumstances does not exist within the meaning of O 15 r 6(2)(b)(ii) of the RC.
I rely on Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors and another appeal* [2008] 3 MLJ 530 at pp 536–537, as follows:

[5] In resolving that question, I begin, as I must, with O 15 r 6(2)(b) of the RHC ...

Two observations are called for. In the first place, it is important to note that the rule permits intervention on two separate grounds. In sub-para (i) it enables intervention where the presence of a party before the court is necessary. In sub-para (ii) intervention is enabled where a party to an action claims relief or a remedy which will materially affect the non-party-intervener's rights. In such circumstances, the court is empowered to permit intervention if it forms the view that to do so will be just and convenient ... The second observation I would make is this. The court should not read the requirements of the rule as though they are words in a penal statute calling for strict compliance with them before intervention may be permitted. Put differently, the rule should be widely or liberally interpreted (see Pegang Mining Co Ltd v Choong Sam). But the court should also bear in mind that 'it must be an interpretation of the language used' by the rule because the rule 'does not give power to add a party whenever it is just or convenient to do so' (Vandervell Trustees Limited v White [1971] AC 912, per Viscount Dilhorne). In other words, no 'process of giving a wide or liberal interpretation to the rule can be employed to alter it or to give it an enlarged meaning which, on a fair and reasonable interpretation, it does not bear' (Vandervell Trustees Limited v White per Lord Morris). (Emphasis added.)

Based on *Dato' Dr Haji Mohamed Haniffa*, even if a wide or liberal interpretation is given to O 15 r 6(2)(b)(ii) of the RC, the proposed intervener has still failed to satisfy this court of the existence of the second set of circumstances;

(c) cl 3.1.2 of the SPA (Kuantan land) had expressly provided that the sale of the Kuantan land was conditional upon the respondent obtaining the consent of the registered chargee under the NLC, namely AIBB ('AIBB's consent'). The proposed intervener had not adduced any affidavit evidence regarding AIBB's consent. There was therefore no evidence

that the proposed intervener had any enforceable contractual right under the SPA (Kuantan land) as against the respondent. In fact, there was a letter dated 7 October 2015 from AIBB which rejected the respondent's proposal in the respondent's letter dated 2 October 2015 to, among others, settle the respondent's indebtedness due to AIBB by way of the proceeds from the sale of the Kuantan land;

(d) the Kuantan land is industrial land (Part 3 of the Schedule to the SPA (Kuantan land)). As such, the proposed intervener's interest in the Kuantan land is purely commercial, namely to ensure the completion of the SPA (Kuantan land), especially when the proposed intervener had paid the deposit and had obtained RHB Bank loan for the Kuantan land. Mere commercial interest of an applicant does not entitle the applicant to intervene in the proceedings. This is clear from the following the Court of Appeal judgment by David Wong JCA in *Dato' Suhaimi bin Ibrahim & Ors v Konsortium Lapangan Terjaya Sdn Bhd and other appeals* [2014] 4 MLJ 419 at pp 425–426:

> [12] There is little doubt that the issue is simply this:
>
> *Whether the respondents' interests are the interests envisaged in O 15 r 6 of the 2012 High Court Rules?*
>
> ...
>
> [16] How the respondents can be affected by the court's decision in this originating summons is hard to comprehend. They are not shareholders of Hi Summit, they just happened to be the defendants in the Suit 1958 which was struck out. They may be beneficiary of that decision but that does not mean that they have any interest in the dispute between the minority and the majority shareholders in Hi Summit. *As rightly pointed out by learned counsel for the appellants, the only interest which the respondents may have is purely a commercial interest linked to the outcome of Suit 1958. Commercial interest is not an interest envisaged in* O 15 r 16. (Emphasis added.)

(e) the dismissal of court encl No 32 would not prejudice the proposed intervener as the proposed intervener could still negotiate directly with AIBB and pay the respondent's indebtedness due to AIBB, especially when the proposed intervener had paid the deposit and had obtained RHB Bank loan; and

(f) this petition had been advertised in the following English national newspapers, namely:

(i) *The Star* newspaper on 11 June 2015 and 12 June 2015; and

(ii) *The Sun* newspaper on 11 June 2015 and 12 June 2015.

If the proposed intervener had constructive notice of the above notices regarding this petition, there would be a delay of more than four months when

court encl No 32 was filed by the proposed intervener (from 11 June 2015–4 November 2015 (filing date of court encl No 32)). Even if I accept the proposed intervener's claim that the proposed intervener only knew of this petition when the proposed intervener received the respondent's letter dated 2 October 2015, there would still be a delay of 33 days (from 2 October 2015–4 November 2015). Such a delay had not been explained in the proposed intervener's affidavit and would support a dismissal of the second first prayer in court encl No 32.

[25] I have not overlooked the letter dated 13 May 2015 from the respondent's then solicitors, Messrs Isherafer Ali & Assoc ('Messrs IAA'), to the petitioner's solicitors ('Messrs IAA's letter dated 13 May 2015'). Messrs IAA's letter dated 13 May 2015 was in reply to the statutory demand. Messrs IAA also represented the respondent in the charge action by AIBB regarding the Kuantan land. Surprisingly, Messrs IAA now represents the proposed interveners. There would not be any room to doubt the bona fides of the proposed intervener if the proposed interveners had been represented by solicitors who were truly independent.

Whether this petition can be stayed

[26] In the event that I have erred in exercising my discretion in refusing leave for the proposed intervener to intervene in this petition, I will now discuss the third prayer in court encl No 32 (to stay this petition pending the completion of the SPA (Kuantan land)). In the second prayer in court encl No 14, the respondent seeks to stay this petition pending the completion of the two sales. As such, I will discuss the third prayer in court encl No 32 together with the second prayer in court encl No 14.

[27] In support of the second prayer in court encl No 14, the respondent's learned counsel had contended that the Kuantan land had been sold to the proposed intervener for RM2.7m while the respondent had sold the KL shop office at RM1.1m. According to the respondent, the total price of the two sales, after deducting the sums due to the two registered chargees (the petitioner is the chargee for KL shop office while AIBB is the chargee for the Kuantan land), would be sufficient to pay the demanded sum. Hence, the need for a stay of this petition until the completion of the two sales. Reliance had been placed by the respondent on the following cases:

(a) the Federal Court's judgment in *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509; [1996] 3 CLJ 657; and

(b) the following the HC's decisions:

(i) *KTL Sdn Bhd v Azrahi Hotels Sdn Bhd (formerly known as Virtual Amber Sdn Bhd); Advance Hotels Supplies (M) Sdn Bhd & Anor, supporting creditors* [2003] 5 MLJ 503; [2003] 3 CLJ 49;

(ii) *Kim Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd* [1990] 2 MLJ 511;

(iii) *AmBank (M) Bhd v Mujur Zaman Sdn Bhd & Ors* [2008] 3 MLJ 608; [2008] 8 CLJ 754 ('Mujur Zaman');

(iv) *Perwira Affin Bank Bhd v KI Production Sdn Bhd* [2000] 4 MLJ 652; [2000] 4 CLJ 482 ('KI Production'); and

(v) *Yu Chee Lieng and others v Khing Tung Realty Sdn Bhd (Part 2)* [2008] MLJU 148; [2008] 10 CLJ 697.

[28] Under s 221(1) of the CA, out of the four possible orders, the winding up court has a discretion to stay the petition, with or without condition. As to how this discretion is exercised, I refer to Abdul Hamid Mohamad JCA's (as His Lordship then was) judgment in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 at pp 203–205; [2001] 3 CLJ 248 at pp 266–269, as follows:

> I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA. I agree entirely with his views. However, *I only wish to add a few words to further emphasise my unhappiness (and his too) about the way winding-up petitions are often conducted.* Indeed what I am saying here is no more than what I have earlier said on at least four occasions when I was sitting in the High Court. Reference can be made to *Buildcon-Cimaco Concrete Sdn Bhd v Filotek Trading Sdn Bhd* [1999] 4 CLJ 135, *Antara Elektrik Sdn Bhd v Bell & Order Berhad* [2000] 6 MLJ 385, *Sun Microsystems Malaysia Sdn Bhd v KS Eminent Systems Sdn Bhd* [2000] 4 CLJ 72 and recently *SP Setia Berhad v Gasing Heights Sdn Bhd* [2001] 6 CLJ 55.
>
> *As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications. That would invariably stall the hearing of the petition proper. If the application is dismissed, the respondent would appeal to the Court of Appeal or may even try to go further, further delaying the hearing of the petition*. I have come across cases where even an order made by the senior assistant registrar under r 32 of the Companies (Winding-up) Rules 1972 was appealed against and when the appeal was dismissed, the respondent further appealed to the Supreme Court — see *Asia Commercial Finance (M) Berhad v Lum Choon Realty Sdn Bhd* (Penang High Court Companies Winding-up No 28-60-92). Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed. *The effect is that the hearing and disposal of the petition is delayed.*

One of the most abused procedure adopted in winding up proceedings is the application to strike out the petition under O 18 r 19 of the RHC 1980 and/or the inherent jurisdiction of the court.

In *Buildcon-Cimaco Concrete Sdn Bhd* [1999] 4 CLJ 135 I pointed out the undesirability of applying such procedure to a winding up petition:

> *Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s 218 winding-up petition which is more simplified and geared for speedy disposal.* RHC 1980, for example, provides for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O 14), striking out of pleadings (O 18 r 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases.
>
> *The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg, service, advertisement, compliance with r 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage.* In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.
>
> Furthermore, more often than not, resort to O 18 r 19 of RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time.
>
> *In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).*

These views were reiterated in *Antara Elektrik Sdn Bhd v Bell & Order Bhd* [2000] 6 MLJ 385 this time in Malay.

In *Sun Microsystems Malaysia Sdn Bhd* [2000] 4 CLJ 72, I stressed the difference between the procedure in respect of a writ action under the RHC 1980 and a winding-up petition under the Companies (Winding-up) Rules 1972:

> *It is important to note that the procedure in a winding-up proceeding as provided by the Companies (Winding-Up) Rules 1972 is different from the procedure in a writ action as provided by the Rules of a High Court 1980 (RHC 1980). In a winding up proceeding, the procedure is simple and brief. That is what it is meant to be. When a*

A *petition is filed, the senior assistant registrar gives a hearing date straightaway before the petition is issued. The petitioner is expected to do everything he or it has to do in terms of complying with the procedural requirements eg, serving, gazetting and advertising, before the hearing date. The petition is to be heard on the date fixed for hearing.*

B On the other hand, in a writ action upon filing no date (be it for hearing or for mention) is given by the senior assistant registrar. He merely signs the writ and issues it. The writ itself clearly says:

> We command you that within eight days after the service of this writ on you, inclusive of the day of such service, *you do cause an appearance to be entered for you at the suit of* ... And take notice, that in default of you so doing the plaintiff may proceed therein to judgment and execution. (Emphasis added.)

C

D The trial date is a long way off. Indeed, there may not be none at all. It is important that the procedure applicable in a writ action should not be incorporated into a winding-up proceeding. It is not meant to be. Appearance is required (and provided for) in a writ action so that the plaintiff will know whether to take a judgment in default or not. If an appearance is filed, followed by defence, then at the close of the pleadings, the plaintiff should apply for

E directions and ask for the case to be set down for trial. In other words, he asks for a trial date. That is not necessary in a winding-up petition because the hearing date has been given even before the petition is issued. That is why there is no provision for appearance, defence, summons for directions, setting down for trial etc. in a winding up proceeding.

F *Finally, the same view was reiterated in SP Setia Berhad* (Kuala Lumpur High Court Winding-up Petition No D8-28-173-2000).

Having written on it four times and in two languages, it is timely that my learned brother Gopal Sri Ram JCA and this court come out strongly against such practice, which, at the very least is delaying the hearing and disposal of winding-up petitions,

G *which is unfair to the petitioners and clogging the court docket*. (Emphasis added).

[29] I will describe the approach laid down by Abdul Hamid Mohamad JCA's judgment in *Maril-Rionebel (M) Sdn Bhd* as the 'Expeditious Disposal Approach'. As a matter of stare decisis, I am bound by Abdul Hamid

H Mohamad JCA's judgment in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd*. In *Infovalley Life Sciences Sdn Bhd v Srimelan Sdn Bhd* [2015] 1 AMCR 707; [2015] 10 CLJ 315; [2015] 3 MLRH 1 at para 12 ('Infovalley Life Sciences'), I have followed Abdul Hamid Mohamad JCA's judgment in

I *Maril-Rionebel (M) Sdn Bhd*.

[30] The expeditious disposal approach is consistent with cases from the following jurisdictions:

(a) Singapore cases are highly persuasive as Singapore's Companies Act on

winding up is *in pari materia* with our CA. The following decisions of the Singapore HC are pertinent:

(i) Sinnathuray J decided as follows in *Re Pentasia (Pte) Ltd* [1979] 2 MLJ 59:

> *A petition for the winding-up of a company is a grave matter for the Company and for those who have dealings with the Company. Section 219(2) of the Companies Act (of Singapore) provides that commencement of winding-up by the court 'shall be deemed to have commenced at the time of the presentation of the petition for the winding-up'. The sections that follow spell out important consequences that affect a variety of matters. Some of them are that creditors are deprived of their remedies against the company; all actions by and against the Company come to a standstill; and, any disposition of property including any transfer of shares or alterations of the status of members of the Company is terminated. The cumulative effect is that a company, upon a petition for winding-up presented against it, cannot carry on business as outsiders will be reluctant to have dealings with it. It is because of these effects that section 221(1) of the Companies Act and Rule 32(2) of the Rules provide that on the hearing of a winding-up petition the court may either dismiss it or adjourn it conditionally or unconditionally.*
>
> *Now, as regards an adjournment it is at the discretion of the court. Having regard to the foregoing, I am of the view that except for a short adjournment to remedy technical matters relating to a petition, any other adjournment must be an exception rather than the rule as it will be prejudicial to the company (see: Re Chapel House Colliery Co (1883) 24 Ch D 259 per Cotton LJ at p 268). It is therefore imperative that the winding-up of a company which cannot pay its debts must be seriously weighed, and once proceedings are commenced they must be prosecuted expeditiously.*
>
> *For the reasons I have given I refused the application for an adjournment of the petition ... .* (Emphasis added.)

(ii) in *Re Pek Chuan Development Pte Ltd* [1988] 3 MLJ 140 at p 143, Chan Sek Keong JC (as he then was) held as follows:

> *I agree with counsel for the company that, as a general rule, winding-up proceedings should be heard expeditiously even where, as here, a company is solvent on the business of company. In the case of a trading or manufacturing company, such proceedings may paralyse its business as suppliers and bankers may stop giving credit. Its whole existence is in doubt pending the disposal of the petition.* (Emphasis added.)

(b) English courts (in chronological order) have decided as follows:

(i) in *Re Metropolitan Railway Warehousing Co Ltd* (1867) 31 LJ Ch 827 at p 830, Cairns LJ (as he then was) held as follows:

> *I am averse to adjourning or suspending the petition, for this reason, that I think it is always a very inconvenient thing for a company to have a pending*

> *petition for a winding-up order hanging over their heads. I think the court should, as far as possible, either make an order upon the petition for the winding up of the company, if it is a fit case, or, if not, dismiss the petition. There are many cases in which it cannot be done; but where that can be done, I think that is the better course, and the more so, because it is well known, if the petition is adjourned, it is adjourned with this consequence imminent over the company, if the winding-up order is made, the winding up will date back to the presentation of the petition, and avoid, therefore, or imperil anything that has been done by the company in the mean time*. (Emphasis added.)

(ii) in *Re Boston Timber Fabrications Ltd* [1984] BCLC 328 at pp 332–333, Oliver LJ (as he then was) gave the following judgment in the English Court of Appeal:

> *... Counsel for the appellant (Mr Stubbs QC) has referred us to a Practice Direction which was issued in 1977 by Brightman J (as he then was), a statement which represented all the views of the Companies Court and which was made with the concurrence of the Vice-Chancellor, in which attention is drawn to the undesirability of lengthy adjournments of winding-up petitions.*
>
> *...*
>
> *It is quite easy to see why, in the case of a winding-up petition it is undesirable that there should be lengthy adjournments. If an order is made on a petition, it dates back to the date of the petition. The company in the meantime is put in the position of having to trade with a winding-up petition hanging over its head. Nobody knows where they stand; if there is, as there was here, an order made under s 227 in the interim, there may be all sorts of difficult questions about whether a particular disposition of the company's assets is, or is not a proper disposition. And a further matter of some considerable importance is this: If anyone else wishes to present a petition against the company, they find themselves, as a practical matter, blocked by a petition being already on the file, and that is of course particularly difficult where you have an adjournment of the sort which we have here, which is a general adjournment for an indefinite period, where the proposed petitioner cannot get the satisfaction of simply giving a notice that he intends to support the petition because he does not know when the petition is going to come on, if indeed at all. So he is thereby kept effectively out of a remedy which the statute gives him as creditor, and that is a most undesirable situation. It is not, therefore, surprising to find that the courts have set themselves against adjournments in the case of winding-up petitions.* (Emphasis added.)

(iii) Robert Walker LJ (as he then was) decided in the English Court of Appeal case of *Re a debtor (No 544/SD/98)* [2000] 1 BCLC 103 at pp 116–117, as follows:

> *... However, it is precisely because of the far-reaching effect of those sections (in the United Kingdom's Insolvency Act 1986) (and comparable sections in*

the winding-up legislation) that the bankruptcy court and the companies court have a strong and well-established policy of discouraging long or repeated adjournments of bankruptcy and winding up petitions. The judge was right to reject the suggestion that he should allow a petition to be presented and then go into suspended animation. (Emphasis added.)

[31] Based on the expeditious disposal approach, the court's discretionary power to stay a winding up petition under s 221(1) of the CA should be exercised sparingly and where there exists exceptional circumstances. Examples of such exceptional circumstances are as follows:

(a) in the HC case of *Re Lo Siong Fong* [1994] 2 MLJ 72 at p 82, VC George J (as he then was) stayed permanently a winding up petition on the following grounds:

> *In all the circumstances, I concluded that the petition was brought for a collateral purpose and in any event has not the remotest likelihood of being successfully proceeded with and ought to be stopped in its tracks*. (Emphasis added.)

(b) in *Ng Tai Tuan & Anor v Chng Gim Huat Pte Ltd* [1991] 3 MLJ 338 at p 340, Chao Hick Tin JC (as he then was) in the Singapore HC, stayed the hearing of a winding up petition against the respondent company on the ground that the respondent company had, among others, two bona fide counterclaims against the petitioners which were based on substantial grounds and either one of the two counterclaims exceeded the judgment sums due to the petitioners from the respondent company.

[32] I cannot exercise my discretion to stay this petition as applied for in the second prayer in court encl No 14 and the third prayer in court encl No 32. The reasons for the exercise of such a discretion are as follows:

(a) in accordance with the expeditious disposal approach, this petition should not be stayed;

(b) this petition should be heard expeditiously in the interest of the following parties (in the order of importance):

(i) the creditors of the respondent, including the petitioner;

(ii) third parties to whom the respondent had disposed of the respondent's assets, such as the proposed intervener; and

(iii) the respondent's employees; and

(iv) the respondent's contributories

All the above parties should be able to know for certain as soon as possible where they stand vis a vis the respondent after this petition has been expeditiously disposed of;

(c) the Kuantan HC has ordered the sale of the Kuantan land and a public auction for the sale of the Kuantan land had been fixed on 26 February 2016 (auction (Kuantan land)). There has not been a stay of the auction (Kuantan land) by the Kuantan HC. Consequently, the Kuantan land may be sold in theauction (Kuantan land) to a bona fide purchaser for valuable consideration. In such an event, the SPA (Kuantan land) cannot be completed and the applications by the proposed intervener and the respondent to stay this petition will then become redundant; and

(d) the respondent had not applied for the consent of the petitioner as the registered chargee of the KL shop office to sell the KL shop office by private treaty. As stated above, there is also no evidence of AIBB's consent to the SPA (Kuantan land).

[33] The petitioner's learned counsel had contended that the total price of the two sales was not sufficient to pay the total sum due from the respondent to the petitioner under various facilities which amounted to about RM12.8m, as at 31 July 2015 ('total due'). I am unable to accept this contention as this petition is solely based on the amended judgment and not the total due. It is trite law that the petitioner is bound by its own petition — please see Abdul Malik Ishak J's (as he then was) judgment in the HC case of *Liew Jui Hua & Ors v Johor Property (M) Sdn Bhd* [1996] MLJU 454 at pp 21–28; [1998] 2 CLJ Supp 34 at pp 45–47.

[34] As regards the cases cited by the respondent:

(a) *Si & Si Sdn Bhd* did not concern a stay of a winding up petition;

(b) in *KTL Sdn Bhd* at pp 507–507 (MLJ); pp 51–53(CLJ), Vincent Ng J (as he then was) decided as follows:

> *The superseding developments referred to above, started as early as 31 January 2002, wherein Encik Azman bin Dawood, the project manager for the respondent who was present, requested for an adjournment for the purpose to effect a settlement and also because counsel for the respondent, Mr Puspanathan was involved in a car accident. This was confirmed by Mr SS Tieh, who appeared for the petitioner, that there was a possibility of a settlement. Accordingly, with the consent of parties present, the court adjourned the matter to 26 February 2002.*
>
> *On 26 February 2002, Mr Puspanathan, the respondent's solicitor, enlarged upon the efforts towards settlement, informing the court of the prospective sale of the respondent's single realty, the Seremban Hilton Hotel. He anticipated the execution of the sale and purchase agreement by the end of March and therefore asked for date in early April 2002.*
>
> *Mr Alex Chang, who appeared for the second supporting creditor, suggested that the Respondent be given an opportunity to resolve the matter, failing which the winding up order be made. In all fairness, he suggested a later dated, sometime in*

mid April 2002. His suggestion was enthusiastically received by Mr Puspanathan.

I had of course, by this time, had the benefit of reading not only the cause papers but also the lengthy submissions prepared by parties for and against the winding up of the respondent. I was minded to grant the winding up order, as I was entirely satisfied that the respondent's case was without merit on law or fact. Clearly, there was no real or bona fide dispute that the debt was due to the petitioner and that the respondent was unable to pay its debts — within the meaning of s 218 of the Act. Indeed, the essential focus of its case is that it needs time to sell its hotel to enable it to pay the respondent. *This request for time to sell the very core of its assets ipso facto shows that the respondent was insolvent; and no attempt was made to persuade this court otherwise, as to its solvency* ...

...

In any event, my view is that, actual solvency of a respondent company in a winding-up application is only relevant to establish the presence of a real dispute as to the debt, since the company is deemed to be insolvent upon failure to pay a sufficiently established debt in accordance with the s 218 notice. *In the above circumstances, the petitioner is entitled to a winding up order ex debito justitiae (see IOC Australia Pty Ltd v Mobil Oil Australia Ltd* [1975] 49 ALJR 176) *though even then the court's discretion, in appropriate cases, to grant grace to settle should be untrammelled* ...

...

Notwithstanding the aforesaid, yet bearing in mind what I thought was the imminent resolution of the matter, I agreed to stand the petition over till 15 April 2002 and recorded an order which was extracted by the petitioner in the following terms:

> IT IS HEREBY ORDERED *by consent that unless the above matter is settled on or before April 15, 2002* between your Petitioner, the supporting creditors and the Respondent, a *companies winding up order shall be made against the Respondent on that date*

(Emphasis added.)

With respect, I am unable to follow *KTL Sdn Bhd*, especially the ruling that the winding up court has 'untrammelled' discretion to adjourn or stand over the hearing of a winding up petition. Firstly, as a matter of stare decisis, I am bound by the expeditious disposal approach as laid down by Abdul Hamid Mohamad JCA in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd*. Secondly, the expeditious disposal approach is justified by pragmatic reasons as expressed in the above cases from Singapore and England. Thirdly, *KTL Sdn Bhd* is easily distinguishable from this case for the following reasons:

(i) the first adjournment of the winding up petition was due to the fact that the respondent company's learned counsel had met with a road accident

and could not therefore attend the hearing of the petition;

(ii) the second adjournment of the petition was supported by the second creditor of the respondent company who supported the petition; and

(iii) the second adjournment was granted by consent of all parties that if the outstanding sum was not settled by the next hearing date, a winding up order of the respondent company would be made ('unless order'). In other words, the second adjournment was only given in *KTL Sdn Bhd* by all parties agreeing to an unless order;

(c) *Kim Wah Theatre Sdn Bhd* can be explained on the following grounds:

(i) the respondent company was a housing developer of low cost flats;

(ii) the respondent company had sold low cost flats to purchasers and a large number of these purchasers were creditors of the respondent company ('creditors/purchasers') which opposed the winding up petition presented against the respondent company; and

(iii) Siti Norma Yaakob J (as she then was), at p 512, allowed an application by the creditors/purchasers (who opposed the winding up petition) to stay the petition for ten months so as to enable the respondent company to complete the flats for the creditors/purchasers:

> *At the hearing of the petition, what the opposing creditors wanted was not to have the petition set aside but merely to seek a stay of the petition for a period of ten months to enable the respondent to complete constructing the flats in Phase IV of the project so that they can fulfil their obligations to the purchasers of the uncompleted flats and in the process settle all outstanding sums due to all their creditors including the petitioner.*
>
> The law on the functions of the court when dealing with a petition for the compulsory winding up of a company is that once the debt has been proved to be unpaid and that the company is insolvent, the petitioner is entitled to a winding up order ex debto justitiae. *However whilst continuing to recognize the creditors's prima facie right to a winding-up order, there are instances where such right is subject to the discretion provided by the language of* s 221(1) of the Companies Act 1965, *in that the court may decide not to do so. One of such instances is where the petition is opposed by a majority of the creditors. In Re ABC Coupler & Engineering Co Ltd* [1961] 1 All ER 354, *it was held that in deciding whether to make a compulsory winding-up order, the court should have regard to the wishes of the majority of the creditors, because these wishes, although not conclusive, possess great weight and if they are reasonable, the court should follow them in the absence of special circumstances. See also the case of Re P & J Macrae Ltd* [1961] 1 All ER 302.
>
> Thus the first matter to be determined is whether the wishes of the majority creditors are reasonable. The area on which work on Phase IV of the project is to be carried out has already been levelled, ready for

construction. On 17 August 1989, Malaysia Building Society Bhd has approved a bridging loan of $2m to finance the development. The main contractors have, by their letter dated 30 August 1989, confirmed acceptance of the work to be done on Phase IV and have since moved into the area to develop the infrastructure and are agreeable to advancing a loan of $150,000 to $170,000 to the respondent to tide over the expenses for the preliminaries. Lastly, there are the purchasers themselves who have already obtained end financing and executed the sale and purchase agreements with the respondent. They stand to lose not only the deposits they had made but also the beneficial ownership of the flats they had contracted to purchase.

Under these circumstances, I consider that the opposing creditors, particularly the majority purchasers of the flats, have made out a reasonable request to stay the petition for just ten months as the respondent has given their undertaking to have Phase IV completed by then. In any event, it cannot be denied that the respondent had already completed Phases I–III and giving them further time will not prejudice the petitioner as the interest on its debt is still continuing.

To rebut this test of reasonableness, the petitioner has to show the special circumstances rendering the winding up desirable. This it proceeded to show by stating that the petition had been adjourned three times to enable the respondent to pay up but to date they had failed to do so. Whilst it is true that there were previous adjournments on the petition, the respondent did manage to complete Phase III of the project during the period of indulgence but whilst they were able to satisfy other creditors, namely, the purchasers of the houses constructed on Phase III, they were still not able to settle the debt due to the petitioner.

Admittedly the judgment debt is due to the petitioner since 1986 but when balancing the wishes of the petitioner against the wishes of the purchasers that make up the majority of the creditors, I consider no special circumstances have been shown by the petitioner to warrant the winding up being made in its favour. On those findings, I had ordered a stay for ten months as that was the undertaking given by the respondent that they would be able to complete the flats on Phase IV by that time and with the profits derived, pay out the debt due to the petitioner. On that undertaking, I had then adjourned the petition to 3 September 1990. (Emphasis added.)

I am of the respectful view that *Kim Wah Theatre Sdn Bhd* should not be applied beyond its distinctive facts. As explained above, as a matter of stare decisis, I am bound by Abdul Hamid Mohamad JCA's judgment in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd*. Furthermore, I am persuaded by the practical reasons underlying the Expeditious Disposal Approach as explained in the above cases from Singapore and England;

(d) *Mujur Zaman* (at pp 755–756) and *KI Production* (at p 483), concerned the HC's power to stay the execution of the HC's order for sale of land

charged under the NLC. *Mujur Zaman* and *KI Production* did not decide a stay of a winding up petition; and

(e) in *Yu Chee Lieng (No 2)*, at p 698, the HC stayed the winding up order pending the appeal by the respondent company to the Court of Appeal against the winding up order. *Yu Chee Lieng (No 2)* did not concern a stay of a winding up petition. I will discuss about *Yu Chee Lieng (No 2)* later in this judgment.

Dismissal of court encl No 32 without costs

[35] Premised on the above reasons, I have no hesitation to dismiss court encl No 32. In dismissing court encl No 32, I have decided to exercise my discretion not to order costs. This is due to the following reasons:

(a) the issue raised by the proposed intervener regarding the winding up court's power to allow intervention of a person who is neither a creditor nor a contributory of the respondent company, is a novel one; and

(b) the petitioner's learned counsel had contended that there was no power for the winding up court to allow the intervention. As elaborated above, I have decided otherwise. In other words, the proposed intervener has managed to persuade me that the winding up court has the discretionary power to allow intervention in winding up proceedings under O 15 r 6(2)(b) of the RC.

COURT ENCL No 14

Can court order petitioner to consent to two sales?

[36] I have already given reasons for declining the second prayer in court encl No 14. In respect of the third prayer in court encl No 14, it is clear that I cannot accede to the respondent's application to order the petitioner to consent to the two sales. My reasons are as follows:

(a) under s 221(1) of the CA, a winding up court only has the power to make the four possible orders. There is no power conferred by s 221(1) of the CA or for that matter, any other provision in the CA, for a winding up court to direct the petitioner to consent to the two sales;

(b) the petitioner is the registered chargee of the KL shop office. There is no provision in the NLC which empowers a winding up court to order a petitioner who is also a registered chargee of the respondent company's land, to consent to any sale of the land by the respondent company; and

(c) AIBB and not the petitioner, is the registered chargee of the Kuantan land. As such, whether the petitioner consents or otherwise to the sale of the Kuantan land by the respondent, is irrelevant.

[37] In view of the above reasons, this court is constrained to dismiss the third prayer in court encl No 14.

Dismissal of court encl No 14 with costs

[38] For reasons stated above, court encl No 14 must be dismissed with costs.

WHETHER COURT SHOULD WIND UP THE RESPONDENT

[39] The respondent's learned counsel had submitted that this petition should be dismissed on the following grounds:

(a) the respondent is commercially solvent for the following reasons:

(i) the respondent is in the process of completing the two sales and the sale proceeds are sufficient to pay the demanded sum;

(ii) the respondent has made three part payments totalling RM300,000 to the petitioner ('three part payments');

(iii) the respondent is still carrying on business by receiving orders from the respondent's customers;

(iv) the respondent has many debtors who owed substantial sums of money to the respondent ('respondent's debtors') such as Perwaja Steel Sdn Bhd ('Perwaja'), Megasteel Sdn Bhd, Amsteel Mills Sdn Bhd and Antara Steel Mills Sdn Bhd; and

(v) Perwaja had entered into a settlement agreement dated 8 October 2013 with the respondent wherein Perwaja had agreed to pay Perwaja's debt due to the respondent (Perwaja's debt). As at 31 August 2013, Perwaja's debt totalled RM13,416,971.30. The respondent however, could not recover Perwaja's debt because Perwaja had obtained a restraining order under s 176(10) of the CA from the Kuala Lumpur HC on 29 October 2013 ('Perwaja's restraining order') which had been extended five times. the petitioner had actual knowledge of Perwaja's debt and had demanded Perwaja to pay Perwaja's debt directly to the petitioner by way of:

(A) a letter dated 5 May 2014 from the petitioner's solicitors to Perwaja; and

(B) the petitioner's letter dated 5 December 2014 to Perwaja; and

(b) this petition had been presented by the petitioner to put improper pressure on the respondent to pay the demanded sum. The petitioner had been negligent in not collecting Perwaja's debt in 2012, before Perwaja obtained Perwaja's restraining order ('alleged negligence'). As

such, this petition had been filed and a winding up order had been sought against the respondent to prevent the respondent from taking legal action against the petitioner based on the alleged negligence.

[40] Firstly, whether a winding up court should wind up a respondent company under s 218(1)(e) of the CA on the ground that the respondent company is unable to pay its debts, depends on the 'commercial solvency' test or 'cash flow solvency' test. In *Infovalley Life Sciences*, at para 24, I have followed the Supreme Court's judgment in *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313; [1992] 1 CLJ Rep 303 Court of Appeal cases in applying the 'commercial solvency' test or 'cash flow solvency' test:

> 24. *Malaysian case law has held that to decide whether a respondent company is able to pay its debts under* s 218(1)(e) of the *CA depends on the 'commercial solvency' test or 'cash flow solvency' test, namely whether the respondent company is able to pay its debts when such debts are due and payable.* Section 218(1)(e) of the *CA does not depend on the 'balance sheet solvency' test, namely whether the respondent company's total assets (including non-liquid assets) exceeds its total liabilities*. I refer to the following appellate decisions of our courts which bind me:
>
> (a) the Supreme Court's judgment in *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 CLJ Rep 303, at pp 307–308; *and*
>
> (b) the Court of Appeal cases of:
>
> (i) *Gulf Business Construction (M) Sdn Bhd* at p 40;
>
> (ii) *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2011] 1 CLJ 947 at pp 961–962; and
>
> (c) *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817, at pp 827–829. (Emphasis added.)

[41] Based on the above 'commercial solvency' test or 'cash flow solvency' test, whether the respondent is commercially solvent or not depends on whether the respondent is able to pay its debts when such debts fall due and payable.

[42] I am of the view that the respondent is commercially insolvent when the respondent fails to pay the demanded sum within the 21 days period as stipulated in the statutory demand. Such a failure on the respondent's part raised a rebuttable presumption of the respondent's commercial insolvency under s 218(2)(a) of the CA. Section 218(2)(a) of the CA provides as follows:

> 218(2) Definition of inability to pay debts
>
> *A company shall be deemed to be unable to pay its debts if —*
>
> *(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto*

lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. (Emphasis added.)

Once a rebuttable presumption of the respondent's commercial insolvency arises under s 218(2)(a) of the CA, the respondent has the legal burden to rebut such a presumption on a balance of probabilities. This is clear from the following appellate cases:

(a) Gunn Chit Tuan SCJ's (as he then was) judgment in the Supreme Court case of *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 at p 319; [1992] 1 CLJ Rep 303 at p 308; and

(b) the judgment of Ramly Ali JCA (as he then was) in the Court of Appeal case of *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2011] 1 CLJ 947 at pp 961–962.

[43] I do not find anything in the respondent's affidavits which can rebut the respondent's commercial insolvency under s 218(2)(a) of the CA on a balance of probabilities. To the contrary, the respondent's commercial insolvency is fortified by the following reasons:

(a) this petition is based on the amended judgment which is final and res judicata. There is no legal avenue for the respondent to challenge the validity of the amended judgment. There is a rebuttable presumption under s 114(e) of the Evidence Act 1950 that judicial acts are presumed to have been regularly performed. In fact, the respondent had admitted the demanded sum:

(i) by making the three part payments; and

(ii) in Messrs IAA's letter dated 13 May 2015 and the respondent's letter dated 2 October 2015 to the petitioner;

(b) the respondent had to sell the Kuantan land and the KL shop office to pay the demanded sum;

(c) the respondent only made the three part payments and was financially unable to pay the demanded sum; and

(d) the respondent's debtors did not pay the respondent.

[44] The following matters, in my view, are irrelevant in decide the respondent's commercial solvency:

(a) the fact that the respondent has assets with a value which exceeds the respondent's liabilities. If the respondent could not pay the demanded

sum, the respondent was still commercially insolvent even if the respondent had substantial assets and was in the process of completing the two sales;

(b) the fact that the respondent is still carrying on business by receiving orders from the respondent's customers. A company may be commercially insolvent by being unable to pay its debts when such debts fall due and yet, the commercially insolvent company still carries on business; and

(c) the alleged negligence. The petitioner's affidavit had claimed that the respondent had absolutely assigned Perwaja's debt to the petitioner. Hence, whether the petitioner could recover Perwaja's debt or not, did not concern the respondent. In any event, the respondent could have filed a suit against the petitioner in respect of the alleged negligence ('negligence suit') and if the respondent is wound up, the respondent's liquidator has the discretion to continue the negligence suit.

[45] Based on the above reasons, I allow this petition with costs and wind up the respondent ('WU order'). Before I appoint the OR as the respondent's liquidator, the petitioner's learned counsel orally applied to appoint the OR as a provisional liquidator ('PL') of the respondent ('petitioner's oral application'). The petitioner's oral application is based on s 227(1) of the CA which reads as follows:

> 227 *The following provisions with respect to liquidators shall have effect on a winding up order being made:*
>
> *(1) if an approved liquidator other than the [OR] is not appointed to be the liquidator of the company the [OR] shall by virtue of his office become the [PL] and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such;*
>
> ...
>
> (Emphasis added.)

[46] In *Dayatera Roof Systems Sdn Bhd (in liquidation) v Seni Teliti Sdn Bhd* [2015] 3 CLJ 940; [2015] 3 MLRH 1, at paras 34–40 ('Dayatera'), I have held that s 227(1) of the CA is not a mandatory provision and the winding up court may appoint the OR as a liquidator of the respondent company (instead of appointing the OR as a PL of the respondent company). The petitioner's learned counsel has kindly drawn my attention to the fact that the Court of Appeal has reversed my decision in *Dayatera* (Court of Appeal's order in *Dayatera*). I am, however, unable to ascertain whether the Court of Appeal has delivered a written judgment in *Dayatera*. As I am bound by the Court of Appeal's order in *Dayatera*, I appoint the OR as a PL of the respondent in accordance with s 227(1) of the CA.

WHETHER THE RESPONDENT CAN STAY WU ORDER

Ad interim stay of WU order

[47] When I pronounced the WU order, the respondent's learned counsel made an oral application ('the respondent's oral application') to stay the WU order pending the filing by the respondent of an:

(a) appeal to the Court of Appeal against the WU order ('the respondent's appeal'); and

(b) application to this court to stay the WU order ('stay application').

The respondent's learned counsel undertook to file the respondent's appeal and the stay application within 14 days.

[48] The petitioner's learned counsel objected to the respondent's oral application.

[49] After hearing oral submission from learned counsel, I allowed the respondent's oral application and granted a stay of the WU order pending the disposal of the stay application ('ad interim stay'). The ad interim stay is granted for the following reasons:

(a) s 253(2) of the CA provides that subject to rules of court, an appeal against the WU order 'shall lie in the same manner and subject to the same conditions an appeal from any order or decision' of the HC. The winding up court has the power under s 73 of the CJA and r 13 of the RCA to stay the WU order pending the disposal of the respondent's appeal. Section 73 of the CJA and r 13 of the RCA provide as follows:

> s 73 *An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders* and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.
>
> r 13 *An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.* (Emphasis added.)

Part 1 of the Interpretation Acts 1948 and 1967 ('the IA') applies to the interpretation of s 73 CJA because CJA has been revised under the Revision of Laws Act 1968 ('the RLA') (please see s 2(1)(b) of the IA). Part 1 of the IA also applies to r 13 of the RCA because RCA have been made under CJA which has been revised under RLA (please see s 2(1)(e) of the IA).

I refer to s 40(1) of the IA (in Part 1 of the IA) which provides as

follows:

> 40(1) *Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing*. (Emphasis added.)

Section 73 of the CJA and r 13 of the RCA confer discretionary power on the winding up court to stay a WU order pending the disposal of the respondent's appeal. I am of the view that s 40(1) of the IA confers power on the winding up court to do whatever is 'reasonably necessary' to decide the stay application, including to grant an ad interim stay pending the disposal of the stay application. In the Court of Appeal case of *Indah Water Konsortium Sdn Bhd v Yong Kon Fatt* [2007] 5 MLJ 250 at p 266; [2007] 4 CLJ 613 at p 636, Heliliah Mohd Yusoff JCA (as she then was) applied s 40(1) of the IA;

(b) if this court has not granted the ad interim stay, the stay application may be rendered redundant; and

(c) there is no prejudice to the petitioner if the ad interim stay is granted. There will however be grave repercussions to the respondent if the ad interim stay is not allowed.

[50] In granting the ad interim stay, I did not consider the merits of the stay application. This is firstly because the merits of the stay application can only be considered after the stay application has been filed and parties have been given a right to adduce affidavit evidence and present submission based on those affidavits. Secondly, if this court has considered the merits of the stay application in granting the ad interim stay, such a decision may bind the subsequent hearing of the stay application. This is due to the effect of the following trilogy of Court of Appeal cases, all decided by Gopal Sri Ram JCA (as he then was):

(a) in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 at p 66, Gopal Sri Ram JCA held as follows:

> We cannot over emphasise the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly.

(b) *Hartecon JV Sdn Bhd* has been followed in *Sykt Telekom Malaysia v Business Chinese Directory Sdn Bhd* [1996] 3 MLJ 692 at pp 694–695; [1997] 1 CLJ 596 at pp 599–600 and *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479 at pp 487–492; [2000] 1 CLJ 553 at pp 563–566.

In view of the above trilogy of the Court of Appeal cases, it is neither just nor desirable to decide the merits of the stay application in deciding whether to grant an ad interim stay or otherwise.

[51] I must emphasise that to avoid any abuse of court process, when the respondent's learned counsel applies orally for an ad interim stay, the respondent's learned counsel must also orally give an undertaking to the court that the respondent shall file the respondent's appeal and the stay application within 14 days or any other reasonable period of time. This is to avoid the possibility of the HC granting an ad interim stay and the respondent company subsequently does not file an appeal to the Court of Appeal and a stay application.

What is the applicable test to stay WU order?

[52] Before I proceed to discuss the stay application, I need to state that there is a clear difference between:

(a) a stay of the WU order pending the disposal of an appeal to the Court of Appeal against the WU order ('stay of WU order pending appeal'); and

(b) a stay under s 243(1) of the CA ('s 243 stay'). Section 243(1) of the CA states as follows:

> *At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.* (Emphasis added.)

[53] The differences between a stay of WU order pending appeal and a s 243 stay are as follows:

(a) for a stay of WU order pending appeal, the respondent company must file an appeal to the Court of Appeal against the WU order. No appeal to the Court of Appeal needs to be filed against the WU order in a s 243 stay;

(b) a stay of WU order pending appeal can only be applied for by the wound up respondent company. However, a s 243 stay may be sought by the wound up respondent company's:

(i) liquidator;

(ii) creditor; *and/or*

(iii) contributory;

(c) the test applicable for a stay of WU order pending appeal (which will be discussed later) is clearly different from the considerations to be taken into account in deciding a s 243 stay. The following cases have laid down the factors to be considered in a s 243 stay:

(i) the Federal Court's judgment delivered by Mohd Dzaiddin FCJ (as he then was) in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709 at pp 716–718;

(ii) Arifin Jaka J's (as he then was) decision in the HC case of *Ting Yuk Kiong v Mawar Biru Sdn Bhd (Harry Lee Yew Tong, applicant)* [1995] 2 MLJ 700 at p 705; [1995] 3 CLJ 136 at p139; and

(iii) my own decision in *Ga-Seng Paper Marketing Sdn Bhd v Percetakan Warni Sdn Bhd* [2015] 4 AMR 221; [2015] 9 CLJ 640; [2015] 6 MLRH 297 at para 19; and

(d) if a stay of WU order pending appeal is granted, either by the HC or Court of Appeal, the effect of such a stay is interim in nature — a stay of WU order will lapse after the disposal of the appeal in the Court of Appeal. If a s 243 stay is granted by the HC, its effect is permanent and the WU order is deemed to have never been made — please see the judgment of the Court of Appeal delivered by NH Chan JCA in *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830 at p 833.

[54] The following cases have recognised the difference between a stay of WU order pending appeal and a s 243 stay:

(a) the Court of Appeal's judgment in *Fairview School (No 1)* at p 108;

(b) the Court of Appeal case of *Equiticorp Holdings Ltd v United Securities Sdn Bhd* [2007] 6 CLJ 268 at p 277 ('Equiticorp Holdings'). I will discuss about *Equiticorp Holdings* subsequently in this judgment; and

(c) *KTL Sdn Bhd* at p 55.

[55] There are three possible approaches as to how the HC may exercise its discretion to decide a stay of WU order pending appeal:

(a) the first approach ('first approach') is explained by Gopal Sri Ram JCA (as he then was) in *Equiticorp Holdings*, at p 277–278, as follows:

> [7] *As may be seen from the authorities discussed in Vijayalakshmi Devi v Dr Mahadevan, s 243(1) has nothing whatsoever to do with staying the effects of a winding up order pending an appeal challenging the making of that order. The latter is governed by s 73 of the Courts of Act 1964. There is also inherent jurisdiction in a High Court to stay the effects of its orders pending appeal. See, Re Wickham [1887] 35 Ch D 272; Fitzholmes v Waryam AIR* [1923] Lahore 514.

Indeed, it is a logical step in the appellate process that if a party has a right of appeal conferred upon it then it has the right to seek and obtain a stay of the order appealed against: The remarks of the Supreme Court in Sri Hartamas Development Sdn Bhd v MBF Finance Bhd certainly lend support for that view. Further, in Chong Wooi Leong v Lebbey Sdn Bhd (No 2) [1998] 2 CLJ 509 Abu Mansor JCA (later FCJ) considered it to be 'trite law that a court which has given judgment certainly has the power to order stay.

[8] Now, it is clear from the order made by the learned judge that he granted a stay pending the disposal of the merits appeal. That is not the kind of order a court makes under s 243(1) of the Act. So, it was obviously uppermost in the mind of the learned judge who is experienced in company law that it was not open for him to act under s 243(1) and that is probably why he limited the stay until the disposal of the merits appeal.

[9] When these matters were raised during argument, learned counsel for the appellant argued that there were no special circumstances warranting the grant of a stay and hence the judge below erred in making the order he did. Now, it is well settled that the grant or refusal of a stay pending appeal is a matter within the discretion of the court. The purpose of a stay is to preserve the integrity of an appeal. See, Jesasu Pty Limited v Minister for Mineral Resources [1987] NSWJB 207. *If the refusal of a stay would render an appeal academic, that fact may move a court to grant a stay. In the case at hand, although no written reasons were provided by the High Court for its decision, it is clear that a reasonable tribunal seised of the facts set out in the appeal record would have exercised its discretion in the way in which the judge did in this case. Accordingly, no appellate error is detectable in the decision of the High Court.* (Emphasis added.)

According to the first approach as explained in *Equiticorp Holdings*, the HC should exercise its discretion to grant a stay of WU order pending appeal so as to prevent the appeal from being rendered nugatory. The first approach has actually been laid down earlier by Gopal Sri Ram JCA's judgment in the Court of Appeal case of *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299. *See Teow Guan* at p 303, concerned an application by the petitioners to stay the hearing of the winding up petition pending the disposal of the petitioners' appeal to the Court of Appeal against the winding up court's order which struck out a prayer in the winding up petition (upon the application by the second to fourth respondents) ('stay of hearing of WU petition pending appeal'). *See Teow Guan* did not concern a stay of WU order pending appeal. Nonetheless the Court of Appeal in *See Teow Guan* adopted the first approach in deciding a stay of hearing of WU petition pending appeal.

The first Approach has been adopted by, among others, David Wong J (as he then was) in *Yu Chee Lieng (No 2)* at pp 699–700, as follows:

[5] *This area of law is well settled and it is this. Whether to grant a stay is purely a matter of discretion for the court and the applicant must show the existence of*

A *'special circumstances' before stay is granted. What amounts to special circumstances depends on each individual case and the list of factors amounting to special circumstances is 'infinite and could grow at any time' (see Edgar Joseph Jr J in Government of Malaysia v Jasanusa Sdn Bhd* [1995] 2 CLJ 701). *It is also my view that a less stringent approach should be taken in this case as it involves the winding up of a company and in this respect I adopt what was said by the learned judge in Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd (No 2)* [2003] 5 CLJ 268, *and it is this*:

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> *I am of the view that there should be a distinction made between an application for a stay of winding-up proceedings and an application for stay of execution of judgment ... The distinction made between an application for a stay of winding-up proceedings and an application for a stay of execution of judgment, in my view is justified among others on the ground that a judgment creditor should not be deprived of the fruits of judgment obtained by him. As such a more stringent test should be applied in application for stay of execution of judgment, namely the 'special circumstances' approach. Whereas a winding-up order has grave and wide repercussions on the wound-up company, its creditors, shareholders ... it is my view that a less stringent test is to be adopted in an application to stay a winding-up order, namely to apply 'Whether appeal would be rendered nugatory' approach'*. (Emphasis added).

C

D

E The first approach has been applied by Warren J in the Supreme Court of Victoria (court of first instance) in *Australian Securities and Investments Commission v ABC Fund Managers Ltd (No 2)* [2001] VSC 383, Commercial & Equity Division (No 7654 of 2000) 15 October 2001;

F (b) in *KTL Sdn Bhd* at pp 55–57, Vincent Ng J (as he then was) followed Plowman J's judgment in the English HC case of *Re A & BC Chewing Gum Ltd; Topps Chewing Gum Inc v Coakley and others* [1975] 1 All ER 1017 ('Re A & BC Chewing Gum'):

G

> *About 3 1/2 months later, on 22 July 2002 (vide enc 47, prayer 4) the respondent filed an application for stay of the winding-up order pending its application to the Court of Appeal for leave to appeal against my decision. It is important to note that this was an application by the respondent for a stay under s 253 and not an application by the liquidator or creditor or contributory under s 243 of the Act, where we have a welter of case authorities. Notably, prayer 4 of encl 47 was for a common law stay, which this statutory court is empowered to entertain under s 253 of the Companies Act 1965, and this stay is distinct from the other specie of stay provided unders 243 of the Act, more commonly described as a statutory or permanent stay, which only the liquidator or creditor or contributory of the company may apply. In considering an application for stay under s 253 it is illuminating to bear in mind the dicta of Plowman J in Re A & BC Chewing Gum Ltd Topps Chewing Gum Inc v Coakley and Ors* [1975] 1 All ER 1017 *who had this to say*:

H

I

> *As I understand it, the position is this. First of all, as a matter of jurisdiction it is quite clear that I have jurisdiction to grant a stay, because the Companies*

Act 1948 says so. It says I can grant a stay on proof to my satisfaction that the proceedings ought to be stayed. But then there is the question of practice, and as a matter of practice a stay is never granted. The only exception that I think is known to the Department of Trade is where I myself once went wrong in the Westbourne Galleries case, and not having been alerted to the position, and not knowing it before, I granted a stay, with precisely what consequences nobody has ever told me. But there are very good reasons for the practice of never ordering a stay, and they are these: as soon as a winding-up order has been made the Official Receiver has to ascertain first of all the assets at the date of the order; secondly, the assets at the date of the presentation of the petition, having regard to the possible repercussions of s 227 of the 1948 Act; and thirdly, the liabilities of the company at the date of the order, so that he can find out who the preferential creditors are, and also the unsecured creditors.

Supposing there is an appeal and the winding-up order is ultimately affirmed by the Court of Appeal, and there has been a stay, his ability to discover all these things is very seriously hampered; it makes it very difficult for him, possibly a year later, to ascertain what the position was at different times a year previously. But assuming a stay is not granted, if the business is being carried on at a profit, as I understand this business now is, really no additional harm has been done once the winding-up order has been made by refusing a stay. As I understand it, if the Official Receiver is given an indemnity, say by the Coakley brothers, who are running this business, he will allow it to be carried on, and the Coakley brothers, in this case, could be appointed special managers and carry on the business as they have been doing. If the business is being carried on at a profit, creditors of the business, after the date of the winding-up order, would be paid in priority to the unsecured creditors at the date of the order as part of the expenses of the winding-up. Then, if the appeal is allowed, the business is handed back as a going concern, it has not suffered any loss. Of course, if the business can only be carried on at a loss — it should not be carried on at a loss obviously.

Those, I think, are really the reasons why, in practice, a stay is not granted — a profitable business can be carried on as it was before and handed back as a going concern if the appeal is allowed. If it is not allowed then, if course, cadit quaestio.

Though I agree with the practical rationale of the above views, as it accords entirely with realism, and I would salute Plowman J for the rare display of candour in his judgment, yet I must state that it is, in my judgment, beyond argument that a company which has been ordered to be wound up has the right to appeal against such an order and to make any and all applications incidental to the appeal, including an application for a stay of the winding up order. But, I must however add the caveat, that for the practical reasons advanced by Plowman J, a stay under s 253 pending appeal should be granted only in very exceptional circumstances, where the winding-up order made is patently wrong in law (for example, the judge being clearly amiss on the law) or on fact, or was made in circumstances which has clearly occasioned a substantial miscarriage of justice.

I am embolden in holding this view, as there may be more than one winding-up petition though only one winding-up order may be made. It may be of interest to know that where two or more petitions are presented for a winding-up order, they take priority according to their dates of advertisement and not according to their dates of presentation. And, another creditor, who chooses to present a second petition does so at his own risk as to costs. Thus, if the first petition is bona fide, then the second petition is dismissed with costs (see *Re Building Society Trust Ltd* [1890] 44 Ch D 140; *Re Norton Iron Company* [1877] 47 LJ Ch 9; and *In re European Banking Company, ex p Baylis* [1866] LR2 Eq 521). *A further practical impediment to granting stay, which I have also to bear in mind, is that if a stay pending appeal is allowed bereft of any exceptional circumstances shown and the same directors and managers, who have brought about the subject company's dire financial straits, are de facto reinstated to run the company, the winding-up order already made would debar the filing of any further winding-up petitions even for future debts until the appeal is decided, which may be several years hence. The consequence could be that, during the interim period these same directors would run the company with impunity causing serious prejudice to other creditors. Thus, in general, an order to wind up a company will not be stayed pending an appeal. It is beyond question that the respondent in the instant case did not even attempt to show such exceptional circumstances, and I refused the stay. Indeed, the application before me for stay was filed on 22 July 2002, that is, over three months after the provisional liquidator had taken over and had gone full steam to manage the respondent's affairs. Subsequently, I was informed that leave to appeal and stay was granted by the Court of Appeal subject to certain conditions*. (Emphasis added.)

The earlier part of the judgment in *KTL Sdn Bhd* seems to have adopted the practice of English courts in not giving stay of WU order pending appeal but the later part of the judgment in *KTL Sdn Bhd* held that a stay of WU order pending appeal is only given in 'exceptional circumstances'. I will refer to the approach laid down in *Re A & BC Chewing Gum* as the 'second approach'.

The second approach had been followed in the following cases:

(i) Harman J's decision in the English HC in *Re Calahurst Ltd* [1989] BCLC 140 at p 141;

(ii) Roth J's judgment in the English HC case of *Re BLV Realty II Ltd* [2010] EWHC 1791 at paras 11–13. It is to be noted that *Re BLV Realty II Ltd* concerned a stay of hearing of WU petition pending appeal and not a stay of WU order pending appeal; and

(iii) the judgment of Vinod Coomaraswamy JC (as he then was) in the Singapore HC case of *Chimbusco International Petroleum (Singapore) Pte Ltd v Jalalludin bin Abdullah and other matters* [2013] 2 SLR 801 at para 97;

(c) a third approach ('third approach') has been expounded by Augustine

Paul JCA (as he then was) in the Federal Court's judgment in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 ('Kosma Palm Oil Mill'). *Kosma Palm Oil Mill* concerned an application to stay the execution of a High Court order pending the disposal of the appeal to the Court of Appeal against the order ('stay of execution pending appeal') and not a stay of WU order pending appeal.

Maziah binti Musa v Dato' Zainulabidin bin Mat Akhir & Ors [2014] 5 AMR 793 is a case on stay of execution pending appeal. In *Maziah binti Musa*, at para 13, I have applied *Kosma Palm Oil Mill* as follows:

> 3. I start with the Federal Court's judgment in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 which authoritatively held as follows:
>
> (a) *the general rule is that an appeal shall not operate as a stay of execution unless the court so orders* (at p 10);
>
> (b) *an applicant for a stay of execution of a judgment or order (Stay Application) has the onus to prove special circumstances to justify the Stay Application* (at pp 10, 17 and 18). *Special circumstances must be deposed in the affidavit in support of the Stay Application;*
>
> (c) *the special circumstances must relate to the enforcement of the judgment or order in question* (at pp 14 and 17);
>
> (d) *there are many factors that may constitute special circumstances. The fact that the appeal will be rendered nugatory (Nugatoriness) is the 'most common' special circumstances. Special circumstances is the genus of which Nugatorinessis a species* (at p 16). *Nugatoriness as the sole test to decide a Stay Application as laid down in See Teow Guan, has been expressly rejected* (at p 11–16);
>
> (e) *the merits of a party's case is not relevant in a Stay Application* (at pp 16–17);
>
> (f) a stay of execution is not granted to give the unsuccessful party time to satisfy the judgment or to alleviate that party's problems (at p 18);
>
> (g) the court may refuse a Stay Application if there is a risk that if the Stay Application is allowed, the appellant may dispose of assets (at p 18);
>
> (h) a Stay Application may be allowed if the appellant can show on affidavit evidence that if the appeal is allowed, the respondent is unable to re-instate the appellant to his or her original position (at p 19); and
>
> (i) a Stay Application may be refused if the respondent is in a position to pay damages to the appellant if the appeal is allowed (at p 19). (Emphasis added.)

[56] Before proceeding further, it seems to me that the position in Australia regarding a stay of WU order pending appeal, is still not settled. I refer to the following Australian cases (in chronology);

(a) in *Brinds Ltd & Ors v Offshore Oil NL & Ors (No 2)* (1985) 10 ACLR 242 at pp 243–245 ('Brinds Ltd (No 2)'), Fullagar J (as he then was) gave the following judgment of a three member coram of the Supreme Court of Victoria:

> *At the outset before this court Mr Shaw QC ... contended that there was no jurisdiction in the Full Court to grant the stay sought by the notice of motion. ... He further contended that this court has no inherent jurisdiction to grant a stay ...*
>
> *In my opinion, the liquidator, conducting a winding up by this court, is under the control of this court, and in my opinion this court has inherent jurisdiction to direct him not to do certain acts pending the hearing of the appeal to Her Majesty in Council, if this court should be of the opinion that the doing of such acts in that interim would be calculated to work injustice ...*
>
> *Further, quite apart from the court's powers over the liquidator in a winding up by the court, the weight of authority is, I think, in favour of there being an inherent power in this court to stay any order, or to stay proceedings under any order, pending an appeal where the refusal of a stay would be likely to work a substantial injustice ...*
>
> ...
>
> *When there is a profitable business being carried on, as was the case of (Re A & BC Chewing Gum) ..., Plowman J said that 'as a matter of practice a stay is never granted'. In my opinion, even where it is not a case of a profitable business being carried on, it must only be in rare circumstances that a company, the subject of a winding up, can stand by for a long period while liquidation proceeds, and then obtain a stay or an order severely restricting the liquidator's activities, whether for a short period pending some event, or generally.*
>
> ...
>
> *It follows that the appellant in such a case must at least demonstrate cogent reasons why a stay should be granted.* (Emphasis added.)

(b) in the Supreme Court of the Northern Territory, Muirhead AJ (as he then was) held as follows in *Arafura Finance Corporation Pty Ltd v Kooba Pty Ltd (No 2)* (1987) 12 ACLR 331 at pp 332–334 ('Arafura Finance Corporation'):

> *A very restrictive approach to the granting of a stay in winding up proceedings was enunciated by Plowman J in [Re A & BC Chewing Gum]. ...*
>
> ...
>
> *Shortly after Alexander, supra, the Victorian Full Court considered the situation in [Brinds Ltd (No 2)]. It affirmed the inherent jurisdiction to grant a stay, the locus standi of the company to seek a stay without the liquidator's consent and*

dealt with matters which went to the exercise of the discretion ...

Various principles (some in apparent conflict) emerge from these authorities — the manner in which they are expressed inevitably being governed to some extent by the nature of litigation in issue and the factual and historical background to the application for stay. I accept the restricted approach of Plowman J referred to earlier in these reasons has not been adhered to in this country, albeit I consider there are sound reasons for cautious examination of such applications in liquidation matters. (Emphasis added.)

(c) in the New South Wales Supreme Court case of *Aetna Properties Ltd v GA Listing and Maintenance Pty Ltd* (1994) 13 ACSR 422, Young J (as he then was) decided as follows:

It is surprising that neither the research of counsel nor my own research has actually found a New South Wales case in which the principles as to whether the Court stays a winding up order, and if so when, has been discussed in this Court. *The English position appears to be that such an order should not be made (see [Re A & BC Chewing Gum]). However in Australia in other States and territories orders staying winding up orders have been made and are reported (see [Brinds Ltd (No 2)] and [Arafura Finance Corporation]). I am of the view that I should follow these Australian cases ...*

The question then is whether the Court should grant a stay. There has been some debate in the cases that I have referred to as to whether special circumstances must be established before a stay is granted. I think that in view of the general attitude taken by the Court of Appeal in this State to applications under Pt 51 R 10 in cases such as Alexander v Cambridge Credit Corporation (1985) 10 ACLR 42*, one does not have to find special or exceptional circumstances but does have to find some valid reason why it is appropriate to stay rather than let the law take its normal course. The normal course of the law is that once a Judge or Master has made a decision that decision should be carried into force.* (Emphasis added.)

(d) the first approach had been applied in *ABC Fund Managers*.

[57] I am of the following respectful view:

(a) there is no 'practice' in Malaysia that a Stay of WU order is 'never granted' as laid down in *Re A & BC Chewing Gum*. This is because s 73 of the CJA and r 13 of the RCA ('two provisions') do confer jurisdiction and discretion on the winding up court to stay a WU order. As such, in view of the two provisions, *Re A & BC Chewing Gum* should not apply in Malaysia because the application of *Re A & BC Chewing Gum*, with respect, will render redundant the winding up court's discretionary power to stay a WU order;

(b) in view of the applicability of the two provisions, there is no need to resort to the inherent jurisdiction of the winding up court. Once again, I refer to the following two judgments of our highest courts:

(i) the Supreme Court's judgment in *Permodalan MBF Sdn Bhd* at p 181; and

(ii) the Federal Court case of *Majlis Agama Islam Selangor* at p 320;

(c) the third approach as held in *Kosma Palm Oil Mill* should be adopted for the following reasons:

(i) the two provisions apply to all kinds of stay pending appeal to the Court of Appeal ('different kinds of stay'), namely:

(A) stay of WU order pending appeal;

(B) stay of execution pending appeal;

(C) stay of hearing of WU petition pending appeal; and

(D) stay of proceedings (besides winding up proceedings) pending an appeal to the Court of Appeal.

As the two provisions apply to all the different kinds of stay without distinguishing any one of the different kinds of stay, the same uniform test of 'special circumstances' should apply to all the different kinds of stay. There is no reason in law and policy why there should be different tests for different kinds of stay; and

(ii) the application of a uniform third approach for all the different kinds of stay ensures clarity and certainty in the law for the benefit of all; and

(d) if the third approach is applicable to a stay of WU order pending appeal:

(i) the general rule as provided in the two provisions is that an appeal to the Court of Appeal against a WU order shall not operate as a stay of WU order pending appeal ('general rule') — please see *Kosma Palm Oil Mill*, at p 10. A stay of WU order pending appeal is an exception to the general rule;

(ii) an applicant for a stay of WU order pending appeal:

(A) has the legal burden to prove special circumstances to justify a stay of WU order pending appeal — please see *Kosma Palm Oil Mill*, at pp 10, 17 and 18; and

(B) must affirm an affidavit to show the existence of special circumstances so as to justify a stay of WU order pending appeal;

(iii) the special circumstances must relate to the enforcement of the WU order in question — please see *Kosma Palm Oil Mill* at pp 14 and 17;

(iv) 'special circumstances' cannot be defined. Categories of 'special circumstances' are never closed. The fact that an appeal to the Court of Appeal may be rendered nugatory ('nugatoriness') is one form of 'special circumstances'. 'Special circumstances' is the genus of which

nugatoriness is a species — please see *Kosma Palm Oil Mill* at p 16;

(v) the merits of the appeal are not relevant to decide to grant a stay of WU order pending appeal or not — please see *Kosma Palm Oil Mill* at pp 16–17; and

(vi) whether a winding up court gives a stay of WU order pending appeal or not, is an exercise of the court's discretion based on whether there exists 'special circumstances' or otherwise. Accordingly, cases wherein courts have granted stay of WU order pending appeal or otherwise, concern solely the exercise of the discretion of the courts in question and do not constitute binding legal precedents from the view point of stare decisis.

Are there special circumstances to grant stay of WU order pending appeal?

[58] After obtaining the ad interim stay, the respondent had filed the stay application in court encl No 42 (court encl No 42). The petitioner's learned counsel has strenuously objected to court encl No 42. With respect, I am not able to agree with the petitioner. I am of the view that the respondent has managed to discharge the legal onus to demonstrate the existence of special circumstances so as to justify the exercise of this court's discretion to grant a stay of WU order pending appeal. The reasons supporting such an exercise of discretion as affirmed in an affidavit filed by the respondent, are as follows:

(a) the respondent conducts a highly specialised business of importing coal of a certain kind and quality, namely 'anthracite' coal and 'coke breeze' from foreign countries such as Peru, South Africa, Korea, China and Vietnam. The respondent then dries, crushes and filter such coal to be supplied to steel mills. There is a special skill involved in respect of the respondent's acquisition, drying, crushing and filtering of the raw materials;

(b) according to s 231 of the CA, the respondent's PL 'shall have and may exercise all the functions and powers of a liquidator'. Under s 236(1)(a) of the CA, the respondent's PL, with the authority of the winding up court or of the 'Committee of Inspection' ('COI'), may carry on the respondent's business 'so far as is necessary for the beneficial winding up' of the respondent. The OR is clearly not in a position to take over the highly skilled industry undertaken by the respondent. Section 236(1)(i) of the CA allows the respondent's PL to appoint, with the authority of the winding up court or of the COI, 'an agent to do any business' which the respondent's PL is unable to do himself or herself. There is no evidence before this court that there is a sufficiently competent company or person, local or foreign, who can be proposed by the petitioner and/or the respondent's PL, to be an agent of the respondent's PL to carry on the respondent's highly specialised business;

(c) the respondent's affidavit has exhibited 'confirmation orders' from the Respondent's customers, emails and tax invoices to show that the Respondent is still receiving orders from its customers and is still carrying on business despite the WU order;

(d) if there is no stay of WU order pending appeal and if the respondent's PL —

(i) decides to stop the respondent's business; or

(ii) carries on the respondent's highly skilled business, with or without an agent under s 236(1)(i) of the CA and subsequently fails to undertake successfully the respondent's business.

The respondent's appeal will be rendered nugatory. As decided in *Kosma Palm Oil Mill* at p 16, nugatoriness is a species of 'special circumstances' which justifies a stay of WU order pending appeal;

(e) a stay of WU order pending appeal does not prejudice the petitioner because:

(i) upon the winding up of the respondent, the petitioner is not entitled to any more interest on any sum due from the Respondent to the petitioner. This is clear from the Federal Court's judgment delivered by Zaleha Zahari FCJ in *Pilecon Realty Sdn Bhd v Public Bank Bhd & Ors and another appeal* [2013] 3 MLJ 1 at pp 5, 10 and 12–15; [2013] 2 CLJ 893 at pp 898, 904 and 906–909, which applies:

(A) s 291(1) and (2) of the CA;

(B) s 4(1) and (2) of the Civil Law Act 1956; and

(C) s 8(2A) of the Bankruptcy Act 1967 ('the BA');

(ii) a stay of the WU order is not a stay of execution of the amended judgment. The petitioner is still entitled to execute the amended judgment as the petitioner thinks fit. The petitioner is therefore not deprived of the petitioner's fruits of litigation in the form of the amended judgment; and

(iii) upon the making of the WU order, there are the following safeguards against unlawful disposition of the respondent's assets:

(A) according to s 219(2) of the CA, the WU order relates back to the date of presentation of this petition — please see Siti Norma Yaakob JCA's (as she then was) judgment in the Court of Appeal case of *Kredin Sdn Bhd v*

Development & Commercial Bank Bhd [1995] 3 MLJ 304 at p 307. Section 223 of the CA provides that any disposition of the respondent's property made after the presentation of this petition shall be void unless such a disposition is validated by the court; and.

(B) s 293(1) and (2)(a)(i) of the CA read with s 53(1) of the BA provides that any transfer, mortgage, delivery of goods, payment, execution or other act relating to the Respondent's property made or done by or against the Respondent within 6 months from the date of the WU order, may be void or voidable as an undue preference — please see the Supreme Court's judgment delivered by Seah SCJ in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 at pp 452, 453 and 455;

(f) a stay of WU order pending appeal may benefit the petitioner. This is because there is evidence that the respondent is still carrying on business. If there is a stay of WU order pending appeal:

(i) if the respondent receives payment from the respondent's customers ('subsequent proceeds'); and

(ii) if the respondent's appeal is subsequently dismissed by the Court of Appeal.

The subsequent proceeds may form part of the respondent's assets to be distributed *pari passu* to all of the respondent's unsecured creditors, including the petitioner; and

(g) a stay of WU order may ensure that the Respondent's employees continue to work and provide for their families.

[59] In deciding court encl No 42, I have not referred to the merits of the respondent's appeal.

[60] In view of the above reasons, I exercise my discretion to grant a stay of WU order pending appeal. I also ordered costs for court encl No 42 in the sum of RM3,000 to follow the event of the respondent's appeal, namely this amount of costs shall be paid by the party who is not successful in the respondent's appeal to the successful party in the respondent's appeal.

SUMMARY OF THE COURT'S ORDERS

[61] Based on the above reasons, the following orders are made:

(a) court encl No 32 is dismissed with no order as to costs;

(b) court encl No 14 is dismissed with costs to be paid by the respondent to the petitioner;

(c) this petition is allowed whereby:

(i) the respondent is wound up;

(ii) the OR is appointed as PL for the respondent; and

(iii) costs of the petition shall be paid by the respondent to the petitioner; and

(d) court encl No 42 is allowed whereby:

(i) the WU order is stayed until the disposal of the respondent's appeal; and

(ii) costs of RM3,000 shall be paid by the unsuccessful party in the respondent's appeal to the successful party in the respondent's appeal.

Order accordingly.

Reported by Afiq Mohd